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Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, prepared pursuant to Human Rights Council resolution 34/35. In the report, the Special Rapporteur provides a summary of the activities undertaken during the period under review and an overview of the thematic work undertaken by the mandate since its creation, in particular the work carried out by the current mandate holder, as this will be his last report to the Council.

The Special Rapporteur analyses the challenges of combating racism, xenophobia and discrimination in the current context of countering terrorism, that have affected several countries. He discusses how hate crimes, xenophobia against migrants and the security measures taken by some Governments in the context of countering terrorism may contribute to fuelling racism, xenophobia and discrimination against certain persons or groups owing to their ethnic origin, religion or migration status. He also analyses key legal and policy measures taken at national, regional and international levels to counter racism, xenophobia and other forms of discrimination in the context of countering terrorism and highlights examples of good practices aimed at eliminating racism, xenophobia and discrimination in the context of countering terrorism.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 34/35. In the first part of the report, the Special Rapporteur provides a summary of the activities undertaken during the period under review and an overview of the thematic work undertaken by the mandate over the more than 20 years since it was created, in particular by the current mandate holder, as this will be his final report to the Human Rights Council. The Special Rapporteur highlights the importance of the thematic issues that he has discussed and their significance in countering racism, racial discrimination, xenophobia and other forms of related intolerance.

2. In the second part of the report, the Special Rapporteur presents an initial analysis of the challenges relating to combating racism, xenophobia and discrimination in the current context of countering terrorism. He considers how hate speech and measures taken by some Governments to counter terrorism may fuel racism, xenophobia and discrimination against persons or groups owing to their ethnic origin, religion or migration status. The Special Rapporteur will also consider key legal and policy measures taken at the national, regional and international levels to counter racism, xenophobia and other forms of discrimination in the context of countering terrorism and highlight a few examples of good practices aimed at eliminating racism, xenophobia and discrimination in that context.

II. Activities of the Special Rapporteur

A. Country visits

3. The Special Rapporteur would like to thank the Government of Morocco for agreeing to a visit. He hopes that his repeated requests to visit India, Japan, South Africa and Thailand, as well as his requests to visit Algeria, Botswana, Nepal, Poland, Slovakia, the Sudan, Tunisia, the United Kingdom of Great Britain and Northern Ireland and the United States of America will receive positive responses. The Special Rapporteur urges the States that have not yet responded positively to his visit requests to do so.

4. The Special Rapporteur visited Argentina from 16 to 23 May 2016 (see A/HRC/35/41/Add.1), Australia from 28 November to 5 December 2016 (see A/HRC/41/Add.2) and Fiji from 7 to 12 December 2016 (see A/HRC/35/41/Add.3). He expresses his gratitude to the Governments of those countries for their full support and cooperation in the preparation of and during his visits.

B. Other activities

5. The Special Rapporteur participated in the High-level thematic debate on human rights convened by the President of the General Assembly on 12 and 13 July 2016 in New York. On 19 September 2016, he addressed the High-level meeting on addressing large movements of refugees and migrants hosted by the General Assembly during its seventy-first session at the round table entitled "Global compact for safe, regular and orderly migration: towards realizing the 2030 Agenda for Sustainable Development and achieving full respect for the human rights of migrants".

6. On 17 March 2017, the Special Rapporteur participated in a panel discussion on racial profiling and incitement to hatred, including in the context of migration, held during the thirty-fourth session of the Human Rights Council in Geneva. On 21 March 2017, he was a keynote speaker at the commemorative plenary meeting of the General Assembly in New York to the International Day for the Elimination of Racial Discrimination, which focused on the state of racial discrimination worldwide.

III. Thematic work of the mandate, in particular during the past six years

7. The thematic work of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has spanned a wide breadth of issues, in accordance with the mandate that was initially established in 1993,[1] ranging from the prevention of racism and racial discrimination to the phenomenon of xenophobia, from racism and discrimination in sports to their manifestations on the Internet. This section aims to take stock of this body of thematic work, including that carried out by previous mandate holders, as a number of the thematic issues that they addressed continue to be of relevance and in need of attention.

A. A global understanding of xenophobia

8. In his 2016 report to the Human Rights Council, the Special Rapporteur discussed the phenomenon of xenophobia, its conceptualization, trends and manifestations (A/HRC/32/50). That report was particularly relevant in the context of modern migration patterns, with close to 244 million people living outside their country of citizenship today, a 41 per cent increase since 2000.[2] Xenophobia denotes "behaviour based on the idea that the other is foreign to or originates from outside the community or nation".[3] While there is a significant overlap between racism and xenophobia, xenophobia involves "attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity".[4] The mandate holders have made and continue to make important headway in differentiating between racism and xenophobia and understanding the causes of xenophobia in order to best prevent and eliminate the phenomenon.

9. Xenophobia has been extensively discussed in several reports by the mandate holders to the Human Rights Council and the General Assembly. In the reports submitted to the General Assembly in 1994 (A/49/677) and 1995 (A/50/476), the mandate holder addressed the issue of xenophobia and discrimination against migrant workers and immigrants. In the 1996 report (A/51/301), he considered the issue through the lens of the global immigration crisis, in which immigrants had become easy scapegoats of the economic crisis. In 2004, the mandate holder focused on the rise of isolationism worldwide and the increasing prevalence of xenophobic rhetoric in political discourse (A/59/329). The 2005 report to the General Assembly (A/60/283) and the 2006 report to the Commission on Human Rights (E/CN.4/2006/16) focused on racism in the fight against terrorism and highlighted how national policies were restricting the economic and social rights of communities affected by xenophobia.

10. In his most recent report to the Human Rights Council in 2016 (A/HRC/32/50), the Special Rapporteur addressed xenophobia and contemporary forms of racism and racial discrimination against vulnerable groups such as migrants, refugees, asylum seekers, persons belonging to minorities and indigenous peoples. He also considered the rise of political parties and movements with xenophobic platforms, as well as laws and policies glorifying historic injustices and fuelling contemporary forms of racism.

11. Xenophobia manifests itself in multiple forms that could be characterized according to the severity, scale and modality of expression. At the most severe, xenophobia could lead to the expulsion or eradication of population groups. At the other end, manifestations of xenophobia could range from bullying to mild hate speech. Between these extremes, there is a range of practices, including political scapegoating, administrative exclusion, selective

[1] See Commission on Human Rights resolution 1993/20.

[2] See http://data.unicef.org/topic/child-migration-and-displacement/migration/.

[3] See www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia/.

[4] Ibid.

and restrictive immigration policies, targeted gang violence, police harassment, profiling and stereotyping in the media.[5]

12. The Special Rapporteur noted that there were various causes of xenophobic attitudes and practices. Some studies have rooted discrimination and bias in human psychology, asserting that people are naturally and inherently scared of those they perceive as different. Ignorance, lack of knowledge about migrants and/or foreigners or socialization itself may also contribute to xenophobia. Other studies have suggested that in times of economic, political or social instability, people often experience a "deficit of belonging", which leads to a tendency to draw boundaries as a way of achieving individual or collective security.[6]

13. Although xenophobia negatively impacts groups and individuals who are perceived as foreign in all countries throughout the world, there is a need to better understand how xenophobia manifests itself differently in different global regions. The Special Rapporteur's work is aimed at improving our understanding of these differences by contextualizing how xenophobia operates in specific regions.

14. The Special Rapporteur noted that it was important that both the mandate as well as other relevant United Nations mechanisms and States maintained a focus on the issue of xenophobia at the global level as it was likely to remain an ongoing challenge. Legal, policy and programmatic measures at the national level were, in particular, key to preventing the spread of xenophobic discrimination and violence and ensuring that those who find themselves victims are accorded the necessary support. Global measures for prevention and accountability remain key and, in that regard, the Special Rapporteur noted with appreciation that the Secretary-General was leading a global campaign against the issue of xenophobia. Similarly, he considered it fitting that xenophobia remained on the agenda of the ongoing discussions and negotiations for the global compact on safe and orderly migration.

Racial profiling in law enforcement

15. In his 2015 report to the Human Rights Council, the Special Rapporteur addressed the phenomenon of racial profiling in law enforcement (A/HRC/29/46). He discussed the implicit biases and how they impacted the frequency of stops and criminal sentences. Racial and ethnic profiling is commonly understood as a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting individuals to detailed searches, identity checks and investigations, or for deciding that an individual is engaged in criminal activity. Its use has often arisen in connection with national security or immigration policies, yet various studies have shown that it is ineffective.

16. In the report, the Special Rapporteur gave an overview of various and increasingly prevalent manifestations of racial or ethnic profiling. The "stop and frisk" operation often disproportionately targets vulnerable populations. Police may also disproportionately target certain minority groups for traffic stops. Profiling also occurs when officials perform identity checks, ostensibly to address irregular immigration. Another manifestation is the increased use of force against minority populations by law enforcement officials. In the context of immigration, racial and ethnic profiling continues to occur at points of entry into States, where customs and border agencies may force certain individuals or groups to undergo additional security checks and interviews. Security measures and surveillance policies enacted in relation to counter-terrorism efforts also motivate the use of racial and ethnic profiling. Profiling in the context of immigration may also limit the ability of individuals to travel, such as when States refuse to issue birth registration and identification documents to members of ethnic groups. Profiling is also prevalent in criminal justice systems, where there is often a correlation between minority status and harsher sentences.

17. The Special Rapporteur highlighted the international, regional and domestic measures taken to combat and prohibit racial and ethnic profiling. He also discussed the

[5] See A/HRC/32/50, para. 38.

[6] *Ibid.*, para. 40.

effectiveness of measures taken to remedy discrimination and highlighted best practices. The Special Rapporteur noted that training alone was likely insufficient, but when paired with other measures, might be effective. He also found that diversity in law enforcement agencies could help to prevent profiling.

18. The Special Rapporteur highlighted the issue of profiling, not just because it remained prevalent, but also because law enforcement constitutes the immediate and street-level representation of the State. Indeed, it is through law enforcement and interaction with law enforcement officers that citizens or ordinary residents experience the power of the State. Racial discrimination in law enforcement is also indicative of the marginal status of groups who are discriminated against and a signal that they will likely suffer racial discrimination in their other interactions with the State. Not surprisingly therefore, the Special Rapporteur noted in the course of his thematic studies as well as through various country visits that individuals who routinely experienced profiling tended to belong to racial, ethnic and national groups which were historically discriminated against or which continued to experience racial discrimination.

B. Racism on the Internet and social media

19. In his 2014 report to the Human Rights Council, the Special Rapporteur examined how new information technologies, such as the Internet and social media, have been utilized to disseminate racist ideas, hate messages and incitement to racial hatred and violence (A/HRC/26/49). With the development of technology, extremist hate sites grew both in number and sophistication and extremist groups found the Internet to be a very useful tool for recruiting new members. In the report, the Special Rapporteur expressed concern about incidents of racist violence and crimes against minorities, the lack of adequate data and the use of the Internet and social media networks by extremist groups and movements to disseminate information and recruit new members. Nonetheless, legal, regulatory, technical and other practical challenges remain a barrier to the fight against racism and incitement to racial hatred and violence on the Internet owing to the lack of clarity in legal terms, differing laws and the trans-border nature of the Internet.

20. The mandate holders have monitored this issue over time and it has been addressed in reports to the General Assembly and the Human Rights Council since 1998. In one of the first reports to address the issue, which was submitted to the General Assembly in 1998, it was noted that over 200 Internet sites worldwide were disseminating racist propaganda (A/53/269). The number of sites has increased exponentially over the last decade. The 1999 report (A/54/347) contained a more in-depth discussion of the issue, including reference to studies and publications as well as measures taken by Governments, and recommendations. In 2000, the mandate holder again raised the issue and noted that the number of sites posting racist propaganda had risen to thousands, particularly owing to a lack of international regulation (A/55/304). In the 2002 (A/57/204), 2003 (A/58/313) and 2004 (A/59/329) reports to the General Assembly, the mandate holder highlighted new measures taken by Governments and other bodies to increase international cooperation on the issue, including the Council of Europe Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems of 2003. In the 2004 report, the mandate holder noted that there was still disagreement as to the most appropriate strategy for preventing the dissemination of racist messages on the Internet. In his report to the Human Rights Council in 2014 (A/HRC/26/49 and Corr.1), the current Special Rapporteur discussed the growth of the phenomenon since those earlier reports.

21. In that report, the Special Rapporteur also reported on the efficiency of the measures taken by governments to remedy such use of the Internet and on the impact of those measures on other human rights, particularly freedom of expression. He highlighted best practices in the field at the international, regional and domestic levels and initiatives taken by civil society and the private sector. He also noted other efforts that may be a cause for concern as they involve private regulation of individuals' expression.

22. The Special Rapporteur expressed concern about the vesting of decision-making power in individuals who lack accountability to determine which content is "racist", "illegal" or "inciting hatred." He noted that Internet service providers and social media platforms should not make decisions regarding user-generated content or be empowered to remove or filter content without external input.

23. The Special Rapporteur highlighted civil society initiatives which complemented those taken by Governments at the international, regional and national levels to combat the spread of racism and xenophobia on the Internet. Those initiatives ranged from knowledge-sharing platforms to the establishment of complaints bureaus regarding discrimination on the Internet and dedicated monitoring and reporting on hate groups and their activities.

24. The Special Rapporteur noted that the Internet and social media will continue to be used by extremist and racist groups to promote racial discrimination and violence and, for that reason, it would remain an important issue for the mandate. More studies are still needed on how the Internet can be more effectively used to prevent and counter incitement to racial discrimination and violence.

C. Focus on prevention of racism, racial discrimination, xenophobia and related intolerance

25. In his 2012 report to the Human Rights Council (A/HRC/20/33), the Special Rapporteur focused on the prevention of racism, racial discrimination, xenophobia and related intolerance, in accordance with the provisions of the Durban Declaration and Programme of Action.[7] He noted that, while a robust legal framework existed for punishing racism and racial discrimination, the legal framework for prevention remained weak, thereby minimizing the effectiveness of punitive measures.

26. The Special Rapporteur outlined five possible preventive measures and policies aimed at ensuring the participation of groups who were discriminated against and marginalized in public and political life, promoting equality of opportunity in social and economic areas and eradicating poverty, mainstreaming a gender perspective, improving the role of education and implementing special measures. He considered that the invisibility of poor and excluded ethnic groups contributed to their vulnerability and reinforced prejudices and discrimination. Broader participation would offer new perspectives and increase interaction. He highlighted the correlation between socioeconomic inequality and racial discrimination: unequal distribution of resources and infrastructure reinforced exclusion of minorities and prevented them from exercising their economic and social rights. Racism and racial discrimination were manifested differently for women and girls, including through sexual violence in conflict situations, coerced sterilization and a lack of access to remedies and complaint mechanisms. He emphasized that education could help to create new values and attitudes and called upon States to establish inclusive school systems that were representative of society's ethnic and cultural diversity, train teachers on racism and racial discrimination, use unbiased textbooks and promote classes that highlighted the history and positive contributions of minorities. Finally, he noted that special measures could have both preventive and corrective functions.

27. Preventing racism, racial discrimination, xenophobia and related intolerance was a multidimensional challenge and any effective preventive agenda must involve various actors. States bore the primary responsibility, but also required the cooperation of political parties, civil society, national human rights institutions, the media and private actors. In certain areas, such as education, capacity-building and training, awareness-raising, research and monitoring, non-State actors played a central role. The Special Rapporteur highlighted other tools to prevent racism and racial discrimination, including new information technologies such as the Internet — although the intersection of poverty and racism meant that excluded minority groups might have less access to the Internet and States should therefore adopt measures to make the Internet widely available, thereby increasing

[7] See www.un.org/WCAR/durban.pdf.

opportunities for meaningful interaction and participation — and sports, which could play a dynamic role in promoting tolerance and racial and cultural understanding.

28. The Special Rapporteur stressed the role of human rights education and the respect and promotion of cultural diversity as means of preventing and eliminating racism and racial discrimination and the need to address institutional racism and racial discrimination in order to increase cultural diversity, facilitate meaningful interaction and highlight the positive contribution of minority groups. He recommended that political parties and the media present opinions and news in the appropriate context and promote attitudes of peace and reconciliation, rather than racially motivated hate speech or xenophobic and intolerant rhetoric.

29. The Special Rapporteur emphasized the importance of the preventive dimension in countering racism, racial discrimination and xenophobia. Preventive measures are important as they support individuals before they become victims of discrimination. Preventing racism, racial discrimination and xenophobia is forward looking as it anticipates violations and addresses their contexts before they happen. He is of the opinion that prevention has not yet received the attention it deserves, although some appreciable progress has been made in some countries.

D. Role of education in preventing racism, racial discrimination, xenophobia and related intolerance

30. In his 2013 report to the Human Rights Council (A/HRC/23/56), the Special Rapporteur focused on the role and place of education in addressing deep-rooted discrimination and the legacy of historical injustices and as a means to enable individuals and groups to lift themselves out of poverty.

31. The Special Rapporteur highlighted three overlapping dimensions to be considered when taking measures to secure access to education: non-discrimination, physical accessibility and economic accessibility. Prohibiting racial discrimination does not exclude resorting to temporary special measures in order to create equality. Physical accessibility may entail the provision of distance-learning methods, State support for the use of various media, promoting access to new technologies, establishing mobile schools and modifying school cycles to take into account cultural practices. Economic accessibility requires that education be affordable to all and guarantees that hidden costs do not lead to discrimination.

32. The Special Rapporteur recommended that States ensure that their general curriculum contains adequate and balanced information on the contribution of minorities, migrants and other groups in the country, so as to promote tolerance and respect. The curriculum should also promote diversity, rather than racial and ethnic superiority, and accurately portray atrocities. Teachers should regularly participate in training on promoting respect for human rights and the fight against racism.

33. The Special Rapporteur considered various contexts that impact the full enjoyment of the right to education without discrimination. Racially motivated violence in schools may contribute to hostile environments and schools should put stronger emphasis on raising awareness about tolerance, non-discrimination and the values of a multicultural society. Education is sometimes used as a tool for ethnic or racial stereotyping. Ensuring access to education during armed conflicts is a major challenge and minority groups are often disproportionately affected during such conflicts. The severe economic crisis in many countries has resulted in drastic budgetary restrictions in the education sector. States must evaluate the potential impact of cuts and ensure they do not have a disproportionate impact on minorities.

34. The Special Rapporteur highlighted the situations faced by various groups. Migrants, refugees and asylum seekers faced multiple discrimination, including in the enjoyment of the right to education. In particular, undocumented migrant children regularly faced a high risk of exploitation, various legal barriers and economic challenges.

35. Country visits enabled the Special Rapporteur to address the centrality of education and its role in enabling the enjoyment of other rights. The Special Rapporteur noted that there would be no significant progress in preventing racism and racial discrimination so long as groups that are discriminated against continue to stagnate or regress with regard to education.

E. Racism, racial discrimination, xenophobia and related intolerance in sports

36. In his report to the General Assembly in 2014 (A/69/340), the Special Rapporteur focused on the issue of racism, racial discrimination, xenophobia and related intolerance in sports, pursuant to the call by the General Assembly in its resolution 58/160 to pay special attention to the increasing frequency of incidents of racism at various sporting events.

37. Although sports have the capacity to demystify racial superiority discourses, modern sports continue to be afflicted by incidents and patterns of racial violence, racial insults and racial intolerance on the field, in sports arenas as well as outside of them.

38. Racism in sports is manifested in various ways, including by the display of racist banners and flags, racist insults and attacks by fans, trivialization of racist chants, racist comments by club officials and managers during sporting events and unequal access to opportunities to participate in sports for ethnic minorities. Indeed, there are certain sports that are historically known as "white" or "elite" sports, including cycling, tennis, golf, equestrian events and swimming. Wealth plays an important role in restricting access to those sports and has a disproportionate impact on racial and ethnic minorities.

39. The Special Rapporteur considered the legal, policy and regulatory frameworks and measures taken at the international, regional and national levels to address this issue. At the international level, various human rights bodies and instruments address these issues. In its general recommendation No. 33 (2009) on follow-up to the Durban Review Conference, the Committee on the Elimination of Racial Discrimination recommended that all international sporting bodies promote a world of sports free from racism, racial discrimination, xenophobia and related intolerance (para. 3 (c)). The United Nations Office on Sport for Development and Peace has also taken various initiatives to regulate and promote sports without discrimination.

40. At the regional level, various initiatives aimed at educating stakeholders and raising awareness of the issue have been taken. For example, Media against Racism in Sport Programme, a joint European Union and Council of Europe programme, is aimed at promoting diversity and non-discrimination in media production and content design, while the European Parliament adopted the Declaration on tackling racism in football, in 2006, which strongly condemns all forms of racism at football matches and notes that the popularity of football offers a new and continuous opportunity to tackle racism. At the national level, several positive initiatives have been taken by Governments and national sports federations to strengthen national frameworks to combat racism and racial discrimination. Civil society has also been active in raising awareness about racism and racial discrimination in sports and in combating such forms of intolerance. For example, Football against Racism in Europe (FARE) is a network of NGOs, amateur groups and supporter clubs in Europe that works to advance the social inclusion of marginalized and disenfranchised groups and to engage policymakers, key players and governing bodies in the anti-discrimination movement.

41. Unfortunately, racism continues to stalk sports. Sports federations and associations as well as relevant regulatory authorities still need to do more. In some cases, penalties have been too lenient to effectively send a message of zero tolerance on racism. The Special Rapporteur considers sports an important opportunity to leverage popular appeal, the influence of sportspeople and the power of regulating agencies to effectively eliminate racism from sports.

F. Value of data and statistics

42. In his report submitted to the General Assembly in 2015 (A/70/335), the Special Rapporteur addressed the role of data and statistics in combating racism, racial discrimination and xenophobia. The previous mandate holder had also highlighted the need to and value of collecting disaggregated data and statistics to combat discrimination. The 2015 report built on an extensive body of legal provisions and recommendations on the collection of data and statistics, including the Durban Review Conference which recommended that States develop systems and mechanisms to collect and analyse data, including equal-opportunity and non-discrimination indicators with a view to regularly assessing the situation of all victims of racism, racial discrimination, xenophobia and related intolerance. The Special Rapporteur noted that the lack of disaggregated data across prohibited grounds of discrimination had led to a significant information gap that obstructed effective policymaking at the national, regional and international levels.

43. Indeed, Goal 17 of the recently adopted Agenda for Sustainable Development calls for the collection of disaggregated data to measure progress and ensure that no one is left behind in promoting and fostering non-discrimination and equality while upholding the universality of human rights. As evidenced by the 2015 United Nations Millennium Development Goals Report, the lack of disaggregated data often led to the implementation of inefficient decision-making and planning and failed to capture inequalities in society. At a time when the international community is initiating discussion on how to measure progressive achievement in relation to the new agenda, a strong commitment to adopting indicators that would enable the capture of all levels of discrimination is needed.

44. The collection of data disaggregated by ethnicity on economic, social, cultural, civil and political indicators is a prerequisite if we are to identify the patterns of discrimination and map existing gaps to increase the visibility of groups that are discriminated against and, in some cases, enable their recognition which is sometimes otherwise denied. Data is also crucial to evaluating the impact of existing measures and developing adequately informed policies to redress the situation of vulnerable groups. The development of measures based on empirical evidence rather than assumptions is needed to optimize the likelihood of effectively impacting the welfare of marginalized groups. Disaggregated data could also serve to improve access to justice for victims of discriminatory practices, which are often difficult to prove on a single-case basis. Data also allows for the detection of practices of racial discrimination in the administration of justice by increasing transparency.

45. The Special Rapporteur noted that while there is no clearly stated international obligation to collect data on ethnicity, the human rights legal framework provides a strong mandate to gather such data as a prerequisite to effectively combating discrimination and achieving universal realization of human rights within society. The State has a duty to ensure equality and this should be interpreted as including the duty to collect and analyse data disaggregated by ethnicity in order to identify inequalities resulting from discrimination and remedy imbalances. Data on ethnicity could be considered as a component of the right to non-discrimination. The right to be free from discrimination includes the right to access information which could serve as evidence to prove discrimination and an argument could be made that data disaggregated by ethnicity is part of such information. Access to adequate and accurate information could additionally have an empowering effect on traditionally marginalized groups and foster their participation in decision-making processes and thus positively impact the realization of other rights.

46. The Special Rapporteur notes that the area of data and statistics still requires more work and focus by the mandate. Without data and statistics it would not be possible to make an accurate determination of progress or lack thereof in any country. The tools for collecting such data and statistics as well as the use to which such data could be put are all part of the substantial work that remains to be done.

IV. Challenges to combating racism and xenophobia in the context of countering terrorism

47. In this section, the Special Rapporteur presents some of the challenges linked to combating racism, xenophobia and discrimination in the current context of countering terrorism threats. The Special Rapporteur recalls that the Human Rights Council, in its resolution 7/34 called upon the mandate holder to examine and report on this particular issue. To that end, the Special Rapporteur will examine how hate speech as well as measures taken by some Governments may have fuelled racism, xenophobia and discrimination against persons or groups owing to their ethnic origin, religion or migration status in the context of countering terrorism. The Special Rapporteur will also examine some key legal and policy measures taken to counter racism, xenophobia and other forms of discrimination in the context of countering terrorism as well as some examples of good practices that have been initiated to eliminate racism, xenophobia and discrimination in this context. He will provide a more elaborate assessment of the issue in his next thematic report to be submitted to the General Assembly later this year.

A. Rise of political extremism and the increased incidence of racist and xenophobic hate crimes and violence

48. The Special Rapporteur has already highlighted the direct relationship between the increase in economic disparity and the increase in xenophobic populist parties. Since the 1990s, income inequality has increased by 9 per cent in developed countries and 11 per cent in developing countries.[8] With the onset of economic crises worldwide, populist parties increasingly gained support by capitalizing on constituents' concerns over the financial burdens of migration and their belief that migrants engage in crime, take jobs away from nationals, pose a threat to national identity or have religious practices that are incompatible with modern societies.[9] Equally concerning is the contagion effect, in which more traditional parties adopt tougher stances on issues such as security, migration and integration in order to counter the rise of right-wing populist parties.[10]

49. Two trends that intensified globally following recent terrorist attacks — the proliferation of anti-Muslim rhetoric and the rise of right-wing extremist parties — have led to an atmosphere of fear towards Muslims in countries where Muslims are racialized or viewed as foreign. For Muslims and those perceived as Muslims living in those countries, these trends have led to increased experiences of racism and xenophobia. At the same time, incidents of anti-Semitic hatred have also increased.

50. Recently, in Europe, a member of a right-wing populist party was running a political campaign and leading in the opinion polls by calling for a ban on Muslim immigration and using derogatory adjectives to qualify them.[11] Another right-wing populist party was arguing in Parliament that immigrants should celebrate local religious holidays in order to become part of the nation.[12]

51. In one Eastern European country, the national Constitution was amended to include the specification of the Christian character of the nation.[13] There were reports of a Government and the media building a campaign focusing on the differences between Christians and Muslims, perpetuating negative stereotypes against Muslims and describing

[8] See A/HRC/31/60, para. 6.

[9] European Union Agency for Fundamental Rights (FRA), *The European Union as a Community of values: safeguarding fundamental rights in times of crisis* (2013), p. 7.

[10] Ibid., p. 17.

[11] See www.bbc.com/news/world-europe-39016179.

[12] See https://perma.cc/66TY-8UMS (in Danish).

[13] Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE-ODIHR), "Fact-finding Meeting: Hate Motivated Incidents Targeting Migrants, Refugees and Asylum-Seekers in the OSCE Region", (Warsaw, December 2015) (hereafter "Report on the fact-finding meeting on the OSCE region").

them as dangerous people.[14] This was in addition to the already disturbing situation of anti-Semitic acts and attitudes. In another Eastern European country, anti-refugee rhetoric was on the rise, with refugees being negatively described as bringing diseases to the country.[15]

52. The Special Rapporteur is concerned that, in one Middle Eastern country, the volatile situation between the majority and the minority has deteriorated with the rise of global terror. By invoking strong antiterrorism rhetoric, while aligning the country's minority and their political aspirations in the region with that of radical Islam, Parliament has adopted several amendments to the country's primary laws in an effort to fight terror.[16] In one Mediterranean country, where the Muslim population is approximately 18 per cent of the overall population, Islamophobia is widespread in public discourse, with several politicians in mainstream political parties leading open attacks on Muslims and presenting them as invaders without any legal ground to seek asylum in the country.

53. The Special Rapporteur learned that, in some Latin American countries, the rise in Islamophobic rhetoric, both in politics and the media, has mirrored the global trend of anti-Muslim sentiment, leading to stigmatization and fear of the Muslim communities that have long inhabited the region. A popular news source in one South American country released an article asserting that more than half of the Muslims in the world were radicalized.

54. In the Asia-Pacific region, negative portrayals of ethnic minorities were also reported. The Government of one Asian country portrayed a Muslim minority ethnic group as having been influenced by foreign terrorist organizations, escalating the already tense relations between the ethnic majority and the minority.[17] In one Southeast Asian nation, Muslims are similarly portrayed as foreign and dangerous in the mainstream national discourse.[18] In the recent parliamentary elections in 2016 in a South Pacific country, one party running on a nationalist far-right platform, which utilized anti-Muslim rhetoric, made unexpectedly large gains in Parliament, resulting in bargaining power with the ruling party.[19]

55. Following the heightened fear of terrorism often linked with counter-terrorism measures and negative rhetoric to Muslim identity, a wave of hate crimes intensified against Muslims or those perceived to be Muslims in countries where Muslim identity is racialized or considered foreign.

56. The Special Rapporteur is deeply concerned that hate crimes in one Western European country have targeted asylum seekers. In 2016, those xenophobic attacks, which included arson attacks against reception facilities, almost doubled from the previous year.[20]

57. In South America, Islamophobia is predominantly manifested in xenophobic slurs and acts of aggression towards Muslims. This is especially true immediately after widely televised terrorist attacks. For example, there was a sharp spike in anti-Muslim hate crimes following terrorist attacks that occurred in 2015.[21]

58. The Special Rapporteur is monitoring long-standing repression of an ethnic minority in one Asian country, which has increasingly been justified by the Government as counter-terrorism action. Following an attack, which killed border police officers in 2016, the Government retaliated by launching a violent counter-insurgency, in which villages were burned and hundreds of civilians were beaten, raped or killed.[22]

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[14] Ibid.

[15] Ibid.

[16] See https://perma.cc/76SD-KUT3.

[17] See https://perma.cc/HM25-LEM7 and https://perma.cc/AF83-24QE and www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=54cf83b51b&skip=0&query=world%20report%202015%20&coi=CHN.

[18] See https://perma.cc/G8AF-3QYF.

[19] See https://perma.cc/AF4A-AGWM and https://perma.cc/X5H8-5LED.

[20] See http://fra.europa.eu/en/publication/2016/current-migration-situation-eu-hate-crime-november-2016.

[21] See https://perma.cc/EU7R-M9B7 (in Portuguese).

[22] See https://www.hrw.org/news/2016/12/21/burma-rohingya-recount-killings-rape-and-arson.

59. The Special Rapporteur expressed concern at the situation of an ethnic minority in one East African country. In response to a spate of terrorist attacks, the Government launched an operation to increase the policing of ethnic minorities and Muslim communities.[23] Over 6,000 police officers were deployed in one suburb, where the forces raided homes and arbitrarily arrested and detained close to 4,000 people, mostly of the country's ethnic minority.[24] There have also been cases of extrajudicial killings of terrorist suspects implicating the country's antiterrorism unit and the police.[25]

B. Xenophobia and racism in immigration and border control policies

1. Freedom of movement

60. Aggressive counter-terrorism policies have disproportionally affected people from Arab countries, considerably restricting their freedom of movement. In one Western European country, hundreds of people have been subjected to administrative bans against leaving or entering the country since 2015.[26] The Special Rapporteur is concerned that the authorities often justify those orders by using counter-terrorism rhetoric.[27]

61. Recently, in January 2017, an executive order was issued in one country, which suspended the Refugee Admissions Programme for 120 days, stopping it indefinitely for refugees from a particular country and banning entry into the country of nationals of seven Muslim-majority countries for national security concerns.[28] However, the courts ruled that there was little proof that the ban was in any way beneficial. Although the refugee programme remains frozen, an appellate court has upheld a stay on the travel ban.[29]

2. Nationality

62. Several Western European countries have amended legislation to make it easier to strip citizens of their nationalities if they are suspected of terrorist-related activities.[30] In more extreme cases, new amendments allow citizens to be stripped of their nationality while abroad or without prior judicial authorization.[31]

63. In almost all countries with nationality-stripping measures, the Government ensures that the removal of citizenship does not have the effect of rendering an individual stateless.[32] However, the Special Rapporteur has found that one country has legislated on the removal of citizenship for foreign-born nationals who only hold the citizenship of which they are being stripped.[33]

3. Treatment of refugees and asylum seekers

64. Responding to the fear of terrorism from an influx of refugees, many countries have enacted xenophobic measures to keep asylum seekers out. The Special Rapporteur documented examples of countries in Western Europe that are not acting fully in accordance with the international law principle of non-refoulement and are deporting

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[23] Jeremy Lind, Patrick Mutahi and Marjoke Oosterom, *Tangled Ties: Al-Shabaab and Political Volatility in Kenya*, Evidence report No. 130, Addressing and Mitigating Violence (Institute of Development Studies, April 2015), p. 25.

[24] See www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups.

[25] See www.hrw.org/sites/default/files/world_report_download/wr2015_web.pdf.

[26] See Amnesty International, "Upturned lives: the disproportionate impact of France's state of emergency" (2016). Available at https://www.amnesty.org/en/documents/eur21/3364/2016/en.

[27] Ibid.

[28] See https://perma.cc/7245-GKMC; also https://perma.cc/L4HZ-RXAT.

[29] United States Court of Appeals for the Ninth Circuit, *State of Washington v. Trump*, Per curiam order No. 17-35105, adopted on 7 February 2017.

[30] See Amnesty International, "Upturned lives" (2016).

[31] See https://perma.cc/5B72-2F9C; and http://eprints.lse.ac.uk/69460/.

[32] Ibid.

[33] Victoria Parsons, "Theresa May deprived 33 individuals of British citizenship in 2015" (Bureau of Investigative Journalism, 21 June 2016).

individuals identified as threats to national security, even though they are likely to experience serious persecution when they return to their country of origin. In one country, a deportation order was enforced even though the country's own protection appeal body had determined that the deported person faced a risk of torture if returned to his country of origin.[64]

65. The Special Rapporteur learned that an Eastern European country had tried to keep refugees out of the country by invoking a state of emergency and empowering the police and military to support the asylum authority in instituting expedited border procedures in "transit zones" and limiting judicial review of asylum decisions issued by the Office of Immigration and Nationality.[65] At the same time, the country's Criminal Code was amended to allow for the criminalization of refugees and migrants who enter the country irregularly through its southern border, allowing for a wide range of penalties, including prison sentences and mandatory expulsion, and resulting in criminal convictions for some refugees.[66]

66. The Special Rapporteur notes that, in May 2016, citing national security concerns, the Government of one East African country had announced the closure of a large refugee camp and the deportation of refugees to their home countries.[67] However, that decision was rendered null and void by the country's high court.[68] The court held that closure of the camp would be illegally discriminatory because it targeted refugees of an ethnic minority.[69]

67. The Special Rapporteur notes with concern that, in the Asia-Pacific region, fear of Muslims has also manifested itself in inhumane policies towards Muslim refugees from war-torn countries who are detained in offshore detention centres where human rights violations have been documented.[70]

C. Impact of overbroad counter-terrorism legislation on the human rights of racial minorities and those perceived as foreign

68. Apart from the marginalizing effects of xenophobic discourse and legislation, many countries have adopted laws with vague definitions of terrorism. These overly broad measures have led, in some instances, to the violation of fundamental human rights.

69. In some European countries, vague terminology has appeared in legal codes, making the limits on freedom of expression unclear. General terms like "glorification", "public provocation" and "apology of terrorism" have begun to appear in charges of incitement to terrorism.[71] These vague criminal statutes have arisen from the efforts of right-wing populist initiatives in direct response to the fear of Muslim radicalization. One Western European country has removed the requirement that the incitement poses the actual risk of a terrorism-related offence being committed.[72]

70. The Special Rapporteur is concerned that several African countries have also adopted vague and sweeping counter-terrorism statutes.[73] Ambiguous definitions of

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[64] Amnesty International, "Uprooted lives" (2016).
[65] Ibid.
[66] Ibid.
[67] See www.refugeesinternational.org/advocacy-letters-1/2017/2/9/dadaab?rq=dadaab.
[68] Ibid.
[69] Ibid.
[70] See www.amnesty.org/en/documents/asa12/4934/2016/en/.
[71] Bibi van Ginkel, "Incitement to terrorism: a matter of prevention or repression?", ICCT Research Paper (August 2011). See also www.nytimes.com/2016/02/25/world/europe/spain-europe-protect-free-speech.html.
[72] Amnesty International, "Uprooted lives" (2016).
[73] See www.americasbar.org/content/dam/aba/administrative/human_rights/counterterrorism_human_rights_advocacy_authcheckdam.pdf; also www.fidh.org/IMG/pdf/afriquecentre648eng2007.pdf.

terrorism and far-reaching laws have enabled these countries to criminalize the exercise of fundamental liberties, peaceful political or social opposition and other legitimate acts.[44]

71. The implementation of such overly broad counter-terrorism policies has led to abuse and stigmatization of an ethnic minority in Latin America, where antiterrorism legislation has been applied against an indigenous population seeking to reclaim its ancestral lands and right of self-determination.[45] The ongoing characterization of this indigenous population as terrorists, both in the media and in political discourse, is a significant obstacle to its realizing its rights to its ancestral territory and of self-determination and has led to targeted violence and excessive force against that community by law enforcement.[46]

D. Surveillance of racial minorities and groups perceived as foreign

72. Overly broad legislation has, in many countries, allowed policing practices which target racial and ethnic minority communities. The constant surveillance experienced by many minority and migrant communities has a chilling effect on freedom of expression and undermines interpersonal and familial relationships, as well as religious practice.

73. The Special Rapporteur is concerned that, in one North American country, the police force in a major city uses dragnet surveillance of the city's Muslim community to observe services at mosques and film the entrances to mosques and produces daily reports on Muslim individuals.[47] That surveillance has never produced any actionable intelligence and the matter has been brought before the court.[48]

74. In one East Asian country, where 90 per cent of Muslims are foreign born,[49] an extensive surveillance programme targeting Muslims has had a disproportionate impact on migrants.[50] An investigation showed that police were creating résumé-like data on Muslim individuals and had surveilled 72,000 individuals from Muslim-majority countries in order to collect their personal information. A high court later found these privacy violations to be legal because they were "necessary and inevitable" to guard against terrorism.[51]

75. The Special Rapporteur noted a similar trend throughout Western Europe. For example, the 2015 Surveillance Law in one Western European country empowers the Prime Minister to authorize the use of surveillance measures, such as capturing mobile phone calls and black boxes from Internet service providers, for the purpose of protecting foreign policy interests, without any prior judicial authorization.[52] More recently, with the goal of preventing terrorism, that same country extended surveillance to individuals suspected of "association" with someone who may constitute a threat.[53]

E. International, regional and national norms prohibiting racism and xenophobia, especially in the context of countering terrorism

76. The Special Rapporteur draws attention to the various international, regional and national legal and normative frameworks that have been adopted to curb racism and xenophobia while countering terrorism.

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[44] See www.fidh.org/IMG/pdf/abuquenstein0630eng2007.pdf.
[45] Chile, Law No. 18314 of 16 May 1984.
[46] See A/HRC/25/59/Add.2.
[47] See www.aclu.org/other/factsheet-nypd-muslim-surveillance-program?redirect=factsheet-nypd-muslim-surveillance-program.
[48] See http://newyork.cbslocal.com/2015/11/19/bratton-muslim-monitoring/.
[49] See www.aljazeera.com/focus/hajj/2009/11/2009113101182515016.html.
[50] See https://perma.cc/8HSB-V7DL.
[51] Ibid.
[52] Ibid.
[53] Ibid.

1. International standards

77. The International Convention on the Elimination of All Forms of Racial Discrimination calls for the elimination of racial discrimination in all its forms and manifestations. The Special Rapporteur considers the following provisions to be especially relevant in the context of countering terrorism: the right to freedom of movement and residence, the right to leave any country and the right to nationality (art. 5 (d) (i), (ii) and (iii)).[54]

78. Similarly, the Durban Declaration and Programme of Action urges States to take measures to end xenophobia and racial discrimination against, inter alia, migrants, refugees and indigenous peoples.[55] The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence calls upon States to take measures to eliminate hate speech and discriminatory practices based on nationality, ethnicity, religion or belief.[56]

79. The United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in its resolution 60/288, is the first comprehensive, collective and internationally approved framework for tackling the problem of terrorism worldwide. It aims at balancing the defence of human rights and upholding the rule of law while countering terrorism.[57] The Plan of action accompanying the Strategy recognizes that any measure taken to prevent and combat terrorism must comply with international law, including the Charter of the United Nations, and in particular human rights law, refugee law and international humanitarian law.

80. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has referred in several of his reports to the measures to ensure respect for the human rights of all and the rule of law, which form one of the action points of the Strategy. Member States resolved to address the structural conditions conducive to the spread of terrorism, including prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socioeconomic marginalization and lack of good governance. They called for action to be taken to address those conditions, while recognizing that none of them excused or justified acts of terrorism.

81. The Special Rapporteur is of the view that the Strategy provides an appropriate framework for States to ensure a balance between effective counter-terrorism measures and the protection of human rights. He notes that the measures proposed in the Plan of action are not conflicting, but rather complementary and mutually reinforcing goals, which would enable States to uphold the rule of law while countering terrorism.

82. The Special Rapporteur highlights General Assembly resolution 61/171 on protection of human rights and fundamental freedoms while countering terrorism, which reaffirms that counter-terrorism measures should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin. He also highlights General Assembly resolution 63/185, which calls upon States not to resort to profiling based on stereotypes founded on the grounds of discrimination on the basis of race, ethnicity or religion.

2. Regional standards

83. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (art. 14) and Protocol No. 12 thereto prohibit any kind of discrimination, while Protocol No. 4 to the Convention provides for freedom of movement (art. 2). The European Commission against Racism and Intolerance, in its general policy recommendation No. 8 (2004) on combating racism while fighting terrorism, recommends,

[54] See www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf.
[55] See www.un.org/en/durbanreview2009/pdf/DDPA_full_text.pdf.
[56] See www.un.org/en/preventgenocide/adviser/pdf/Rabat_draft_outcome.pdf.
[57] See A/60/825.

inter alia, that States guarantee in a non-discriminatory way the freedoms of association, expression, religion and movement and ensure that no discrimination ensues from legislation and regulations or their implementation.[58] It also recommends that States ensure that their national legislation expressly includes the right not to be subject to racial discrimination among the rights from which no derogation may be made even in time of emergency.[59]

84. The African Charter on Human and Peoples' Rights provides for the right to freedom from discrimination of any kind (art. 2) and the right to freedom of movement (art. 12). In its Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, the African Commission on Human and Peoples' Rights, states, in relation to fundamental freedoms, that "States shall not use combating terrorism as a pretext to restrict fundamental freedoms ..." (p. 14).[60]

85. The Organization of American States has adopted several instruments aimed at combating racism and xenophobia, the main one being the American Convention on Human Rights (Pact of San José). More specifically, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance provides for States parties to ensure that the adoption of measures of any kind, including those on security matters, does not discriminate directly or indirectly against persons or groups on the basis of race, colour, lineage or national or ethnic origin (art. 8).

3. National standards

86. The Special Rapporteur notes that, in promulgating counter-terrorism legislation, many States have implemented review mechanisms to ensure that legislation is concordant with human rights standards. Some States have also included sunset clauses in their counter-terrorism laws, which require renewal to stay in effect.[61] The Special Rapporteur will further examine and review the national standards designed to counter racism and xenophobia in the context of countering terrorism in his next thematic report to be submitted to the General Assembly later this year.

F. Good practices

87. Despite the disturbing trend towards racist and xenophobic rhetoric and policies as a response to fears of terrorism, some countries have taken concrete and effective steps to combat racism and xenophobia.

88. For example, in order to counter Islamophobic sentiment caused, in part, by the large influx of Syrian refugees and the fear of a terrorist attack, Argentina has prepared an awareness-raising and training plan to be implemented in all schools. The plan is aimed at combating ignorance about Islam and Muslims by teaching students about the history of Islam and Muslim beliefs and elucidating the prejudices that have led to the association of Muslims and Arabs with terrorism.[62]

89. The Special Rapporteur learned that Greece has issued recommendations to combat the rising racist and xenophobic violence within its borders, including through "improved training of the police and the judiciary with regard to racist crimes".[63] Spain has developed a project to train national and local police and security forces on identifying racist and xenophobic incidents.[64]

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[58] See fifth recommendation to governments of member States.

[59] See sixth recommendation to governments of member States.

[60] See www.achpr.org/files/instruments/principles-guidelines-countering-terrorism/principles_and_guidelines_on_human_and_peoples_rights_while_countering_terrorism_in_africa.pdf.

[61] See A/HRC/16/51.

[62] See www.lanacion.com.ar/1937158-capacitaran-a-alumnos-para-que-entiendan-de-que-se-trata-el-islam.

[63] See A/HRC/32/50/Add.1.

[64] See A/HRC/23/56/Add.2.

90. In addition to training of national police, security and border-control personnel, Governments have tried to aid in the social integration of immigrants and refugees. The Special Rapporteur was informed that, in Denmark, the municipal government in Aarhus decided that it would not criminalize the re-entry of citizens who had left the country to fight in Syria, but has instead welcomed them back with tools and support to rehabilitate and reintegrate them back into society.[65]

91. In Portugal, the Government has set up a programme to facilitate the integration of migrants into the labour market with a view to avoiding the negative consequences of long-term unemployment for both nationals and migrants.[66]

92. The Special Rapporteur was encouraged to learn that the Government of Canada had recently adopted legislation which allows Canadian citizens to sponsor refugees and provides for assistance and support to help refugees integrate into the new society.[67]

V. Conclusion

93. The Special Rapporteur would like to thank the Human Rights Council and Member States for the privilege and opportunity he has had to serve in this capacity. During his term in office, he addressed multiple aspects of racism and intolerance, from racial profiling in law enforcement and the prevention of racism, racial discrimination and related intolerance to racism on the Internet and in social media, racism, racial discrimination, xenophobia and related intolerance in sports, the exploitation of the Internet for recruitment and incitement to racial discrimination and violence, the role of education and of data and statistics in combating racism, among others.

94. The Special Rapporteur undertook country visits to eight countries in Africa, Asia, Europe and the Americas. During those visits, he had the privilege of engaging in constructive dialogue with State officials on the challenges encountered as well as progress made in combating racism, racial discrimination and xenophobia in their respective countries. The Special Rapporteur would like to thank the Governments of countries that issued invitations to visit and those that accepted his requests to visit. He remains concerned that some States have not yet favourably responded to long-standing requests by previous and the current mandate holder for an official visit and urges them to consider extending an invitation to the mandate in a timely manner.

95. Given the increase in xenophobic sentiment and racism globally as evidenced by the rise in right-wing populism, the increase in manifestations of racist and xenophobic hate crimes and xenophobic and racist attitudes in immigration and border control measures, the Special Rapporteur emphasizes that the need to continue to pay close attention to those issues is more relevant than ever.

96. Efforts to counter terrorism threats throughout the world have posed serious challenges to combating racism, xenophobia and discrimination. Strict immigration and border control measures, overly broad counter-terrorism policies and surveillance have contributed to fuelling racism, xenophobia and racial discrimination. Furthermore, the rise in hate crimes and a renewed platform for right-wing populist rhetoric, incited by growing economic disparity has resulted in the marginalization of persons or groups on the basis of their ethnic origin, religion or migration status. Against that backdrop, the Special Rapporteur felt compelled to examine those issues and to exchange and consult with experts and relevant stakeholders to propose ways of addressing them. That will be the subject of his final report to the General Assembly later this year.

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[65] See www.npr.org/sections/health-shots/2016/07/15/485900076/how-a-danish-town-helped-young-muslims-turn-away-from-isis.

[66] See http://publications.iom.int/system/files/pdf/migration_and_the_economic_crisis.pdf.

[67] See www.nytimes.com/2016/07/01/world/americas/canada-syrian-refugees.html.

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Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Argentina

Note by the Secretariat

At the invitation of the Government, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance visited Argentina from 16 to 23 May 2016. The mandate holder addresses the persisting challenges the country faces in fighting racism, racial discrimination, xenophobia and related intolerance, including not only the alarming situation of indigenous peoples, but also the marginalization of migrants and people of African descent. He examines access to economic, social and cultural rights, access to justice, police profiling and stigmatization and makes recommendations.

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Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Argentina*

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* Circulated in the language of submission and in Spanish only.

I. Introduction

1. At the invitation of the Government, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance visited Argentina from 16 to 23 May 2016. During the visit, the Special Rapporteur held meetings in Buenos Aires, the Province of Buenos Aires, Salta and Formosa. He met with officials, both at the federal and provincial levels, including the Minister for Justice and Human Rights, the Governors of the provinces of Formosa and Salta and the Vice President of the National Supreme Court. He also met with United Nations agencies, civil, indigenous and migrants' communities, Afro-Argentines, representatives of the Jewish community and victims of discriminatory practices.

2. The Special Rapporteur was also granted access to the penitentiary facility of Ezeiza, where he met with prison authorities and detainees.

3. The Special Rapporteur wishes to thank the Government for its cooperation in the preparation and conduct of the visit. He also addresses his sincere gratitude to the Office of the United Nations Resident Coordinator, civil society organizations and communities that travelled from remote parts of the provinces to meet with him.

4. The Special Rapporteur notes with appreciation that Argentina has a legal and institutional framework to address issues of discrimination but is alarmed that, in spite of the many recommendations issued by various human rights mechanisms, the situation remains dire for historically marginalized groups. He hopes that, by adopting his conclusions and recommendations, the Government can effectively address the prolonged severe situation of certain population groups, especially indigenous peoples.

II. General background

5. Prior to Colonization in the sixteenth century, the population of Argentina had been composed of indigenous peoples. Buenos Aires was founded in 1580, by the overflow from the neighbouring Spanish colonies. Argentina has always been the country in South America with the broadest migration history and remains the country with the greatest number of immigrants in the region. Historically, immigrants arrived from Europe and from neighbouring Latin American countries, mainly Chile, Paraguay, the Plurinational State of Bolivia, Uruguay and Peru. A significant number of African slaves were also brought to Argentina. In 1810, black people represented one third of the population of Buenos Aires.[1] These historical facts are important in understanding the current fabric of the Argentine society but also the history of inclusion and exclusion in the country.

6. Indeed, the history of discrimination and xenophobia in Argentina can be traced back to the country's beginnings. The Argentine identity has been built on the negation or the subordination of minority groups. In the process of the construction of the State, there has been a tendency to homogenize by failing to recognize certain groups, such as indigenous peoples or Afrodescendants, which translated into the suppression of the expression of their cultures and languages and ultimately their invisibility in society. Indigenous peoples and people of African descent were framed as being in a stage of very primitive "evolution", a perception in line with the racist ideology of that time. They were viewed as outsiders to the country's aspiration to build a "model European civilized society".

7. Nation-building in Argentina was based on a Eurocentric vision that glorified the idea of the educated, white European immigrant, as contained in the 1853 Constitution. The cultural, social and economic contributions of historic migration waves is undeniable, and the idea that Argentina is the "Europe of Latin America" became deeply ingrained in the country's ideal and persists today.

[1] See Government of Buenos Aires, *Bicentenario: 1810-2010: Memorias de un pais* (Buenos Aires, 2010), https://cen7.files.wordpress.com/2011/04/bicentenario.pdf.

8. Argentina is a federal constitutional republic with 23 provinces and an autonomous city, the capital Buenos Aires. Provinces enjoy a high level of autonomy, which also explains the different levels of implementation of anti-discrimination laws and measures. The provinces with the highest proportion of indigenous are also the places with the greatest incidence of violent expression of racism and discrimination against this minority.

III. Legal framework for combating racism and discrimination

A. International human rights obligations

9. Argentina has ratified all the international human rights instruments,[2] including the International Convention on the Elimination of All Forms of Racial Discrimination. The country made a declaration under article 14 of the Convention in which it recognized the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals claiming to be victims of violations of any of the rights set out in the Convention. In addition, Argentina ratified in 2000 the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169). However, it has not ratified the ILO Migration for Employment Convention (Revised), 1949 (No. 97) or Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

10. In 2001, the Government of Argentina committed to integrating the conclusions of the Durban Declaration and Programme of Action into a national plan of action against discrimination.[3]

11. At the regional level, Argentina is party to a number of instruments, and in 2013 signed the Inter-American Convention against All Forms of Discrimination and Intolerance and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, but is yet to ratify them.

B. Constitutional provisions

12. The 1994 Constitution defines Argentina as a democratic and pluralistic society, with a focus on the full respect of human rights. Its pillars include the equal enjoyment of rights for all inhabitants, whether Argentine or foreign.[4] The term "inhabitant" refers to nationals and foreigners residing on the national territory, even if they have not taken up residence and therefore applies to migrants and asylum seekers. Article 20 stipulates that foreigners enjoy within the territory of the nation all the civil rights of citizens. However, the 1994 Constitution maintained article 25 of the 1853 Constitution, which specifically mentions that the Federal Government shall foster European immigration. The Rapporteur is of the view that this may be in contradiction with the principle of equality.

13. Article 75 (17) establishes the acknowledgement of the ethnic and cultural pre-existence of indigenous peoples of Argentina. It further guarantees respect for their identity and their right to bilingual and intercultural education and recognizes the legal capacity of these communities and their ownership of the lands they traditionally occupy. However, the visit revealed that those provisions have not yet been implemented in reality.

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[2] See national report submitted in accordance with para. 5 of the annex to Human Rights Council resolution 16/21 (A/HRC/WG.6/14/ARG/1), para. 7.

[3] See *Towards a National Plan against Discrimination: Discrimination in Argentina* (Buenos Aires, 2005), pp. 12 and 13.

[4] See arts. 14 and 14 bis.

C. Legislation prohibiting racism, racial discrimination, xenophobia and related intolerance

14. Racial discrimination is prohibited under Law 23.592 of 1988 but only classified as a civil offense, as previously highlighted by various mechanisms. Moreover, the definition adopted is not in line with that of the International Convention on the Elimination of All Forms of Racial Discrimination.[5] The Rapporteur was informed that there was a bill under consideration to address this discrepancy. Participation in racist organizations and propaganda rooted in ideas or theories of racial, sexual, social or national superiority and incitement to persecute or hate on racial grounds are specifically penalized as criminal offenses[6] with penalties ranging from one month to three years' imprisonment. Article 80 of the Criminal Code[7] recognizes hatred based on race, religion, gender, sexual orientation or gender identity as aggravating circumstances in homicide cases.

15. Article 13 of the 2004 Migration Act (Law 25,871) — recognized internationally as very progressive — expressly prohibits discrimination. Article 6 requires the State to guarantee migrants and their families the same access to rights as enjoyed by nationals, particularly with respect to social services, public goods, health, education, justice, employment and social security. Article 7 provides that in no case shall the migratory status of an individual constitute an impediment to gaining access to education, either in public or private institutions, and at all educational levels, including higher education. However, the limited public awareness of the law and its poor implementation remain major pitfalls exposing migrants to situations of de facto discrimination, marginalization and/or exclusion.

16. The National Law on Education (26.206) gives the promotion of an understanding of the elimination of all forms of discriminations as one of the objectives of the national education policy, which also aims at ensuring equality while respecting differences between persons without discrimination of any kind. The Law further mandates the development of policies to promote equality in education and deal with situations of discrimination arising from socioeconomic, cultural, geographic, ethnic, gender or any other factors that affect the full exercise of the right to education (art. 79). It requests that national curricula be defined in order to promote respect for multiculturalism and knowledge of indigenous cultures, fostering the understanding that cultural diversity is a positive attribute of Argentine society (art. 54). Under its title XI, the law calls for the development of intercultural bilingual primary and secondary education and facilitates interactions with other components of society.

17. Labour Law 20.744 of 1976 prohibits the discrimination of employees on various grounds, including race, nationality, religion (art. 17), and provides for the possibility of implementing affirmative action with a view to redressing inequalities (art. 17 bis).

18. Law 23.302 of 1985 on the protection of indigenous communities stipulates that it is of national interest to support and defend such communities, and provides for the development of plans to facilitate their access to land ownership and promote their socioeconomic development and access to basic needs, including adequate health and education services. The law marks the official recognition of the historical claims of the indigenous communities and calls for the establishment of the National Institute for Indigenous Affairs.

D. Relevant policy and institutional framework

19. In 2005, Argentina developed the National Plan against Discrimination[8] in cooperation with United Nations agencies. The Plan's original assessment determined that

[5] See art. 1.
[6] Art. 3, Act No. 23.592.
[7] Law 26.791; see also arts. 92 and 105.
[8] Decree No. 1086/2005.

discrimination in Argentina remained structural. It identified the various groups subjected to discrimination and the trends and manifestations of the phenomenon, and recommended that any discriminatory act be elevated to a criminal offence and referred to federal jurisdictions.[9] However, that recommendation remains unfulfilled. As part of the Plan, a proposal was put forth for reforms in various fields, ranging from the administration of justice, public administration and security forces to education, health and media, while delineating emergency actions to be taken, some of which have been implemented.

20. Argentina has established a number of institutions to address the issue of discrimination. The Secretariat for Human Rights, under the Ministry of Justice and Human Rights, manages a national directorate for vulnerable groups to ensure the effective implementation of national and international standards that guarantee the human rights and fundamental freedoms of vulnerable groups, including the destitute, migrants, children, asylum seekers, persons with disabilities, the elderly, women, indigenous peoples and sexual minorities.[10] The Human Rights Secretariat has a centre dedicated to receiving complaints and to citizen orientation, focusing on rights violations or denials by national, provincial or municipal institutions or agents. The centre organizes arbitration between the parties in conflict or refers the cases to the judicial system along with an opinion based on collected evidence.

21. The National Institute against Discrimination, Xenophobia and Racism was created in 1995 by Law 24.515 as a decentralized institution. Its main objective is to develop national policies to combat all forms of discrimination, xenophobia and racism, and promote and implement federal and cross-cutting public policies articulated in consultation with civil society. The Institute coordinates three observatories to monitor discrimination on the radio and television, discrimination in sport and discrimination on the Internet.

22. The Institute also has a mandate to receive and keep a record of complaints related to discriminatory, xenophobic or racist behaviours. It reported that, in 2015, it had received 1,794 cases, of which 741 had been resolved. The Special Rapporteur notes with appreciation the fact that the Institute has decentralized representations in all provinces, and is of the view that, in the light of the severity of the situation faced by certain indigenous communities in certain provinces and their difficulties in gaining access to justice, the Institute should reinforce its efforts related to the documentation of violations and complaints and use the established jurisprudence whereby it can be a plaintiff in cases of discrimination. In order to be more transparent, the data on registered complaints should also be disaggregated by province and grounds of discrimination on a yearly basis.

23. The Special Rapporteur also notes with appreciation that the Institute has produced two editions of national and local maps of discrimination, with a view to disseminating reliable data on the subject, assessing the situation of individuals and groups who are victims of discrimination and informing policies. The maps reflect the perceptions and experiences of discrimination by the population at large, mostly disaggregated by gender, age and socioeconomic situation. The Institute has developed the maps in conjunction with universities throughout the country. This work allows the collection of data on the national territory but also provides a platform for the issue of discrimination to be discussed within the university system, which remains reticent in addressing the subject. However, the Special Rapporteur notes that the disaggregation of data by ethnicity or identity is not systematic for all indicators. In the most recent map, produced in 2014, the questionnaire contained a section on sociodemographic characteristics of respondents that included province of residency, locality, sex, age, level of education, occupation and socioeconomic index, but no question on the ethnic or group identity.[11]

24. The National Institute of Indigenous Affairs was established in September 1985 by Act No. 23.302. It is mandated to uphold constitutional provisions on the rights of

[9] National Plan against Discrimination, 2005, p. 6.

[10] See the common core document for Argentina dated 8 July 2015 (HRI/CORE/ARG/2014), para. 97.

[11] See Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo, *Mapa nacional de la discriminación. 2a ed.* (Buenos Aires, 2014), p. 14, available from www.inadi.gob.ar/mapa-discriminacion/documentos/mapa-de-la-discriminacion-segunda-edicion.pdf.

indigenous peoples, including their right to participate in decisions that affect them, yet has been criticized for implementing a social welfare approach to supporting indigenous communities, rather than promoting their sustainable development. The Institute manages the national registry of indigenous communities and coordinates their effective involvement in the elaboration and implementation of programmes and policies, including issues of land survey and social services, in consultation with the Council of Indigenous Participation, established by law to ensure the participation of indigenous peoples in decision-making processes. However, concerns persist about the fact that the Government has the final say in determining the modality of the selection of representatives of indigenous communities in the Council, which convenes at the discretion of the President of the National Institute of Indigenous Affairs, who has never been someone from indigenous communities. The Special Rapporteur notes with gravity the continuing level of distrust regarding the ability of the Institute to represent effectively indigenous interests, and its limited financial capacity to fulfil its mandate. The Institute is also in charge of managing the most contentious aspect of indigenous land ownership, namely, the demarcation of the lands that the communities occupy. Indigenous communities still experience challenges in receiving proper support from the Institute in order to obtain recognition as legal entities and to be able to follow the procedure to its conclusion once they have introduced their claim for land ownership; challenges also exist in receiving adequate support when seeking remedies for undue evictions.

25. Article 86 of the Constitution of 1994 establishes the Office of the Ombudsperson. The Constitution provides the office with the procedural right to seek justice whenever the collective rights of citizens are threatened, violated or repudiated by any action of the State. The Ombudsperson may launch investigations into public administration acts that may infringe rights and interests, including extended or collective interests. Certain groups benefit from special attention, including indigenous peoples and migrants. It is worth noting that, despite the many calls and recommendations made by various human rights mechanisms, at the time of the visit there had not been a formally selected Ombudsperson since 2009. However, the officer in charge and his team, including provincial delegates, have documented and investigated reports of rights violations and addressed the institutions concerned.

26. The Media Ombudsperson mandated by Law 26.5220 receives and channels complaints from the general public with a view to promoting and defending people's rights regarding both public and private audiovisual media. It also has a mandate to promote the participation of all sectors of society in the media. Since starting its operation late in 2012, the institution noted that historical patterns of discrimination and exclusion are also reflected in the audiovisual media in the form of communicational practices ranging from negative representations and stereotyping and discriminatory rhetoric to blatant invisibility, namely, in news reporting and advertising.

IV. Trends and manifestations of racial discrimination in Argentina

27. The Special Rapporteur notes with concern that little improvement has been made in the situation of historically discriminated groups since the most recent visit by the Special Rapporteur on the rights of indigenous peoples in 2012 and the Committee on the Elimination of Racial Discrimination reviews in 2010 and 2016. The Special Rapporteur found that in Argentina discriminatory practices often intersect with poverty more severely affecting minority groups, including indigenous peoples, afro-Argentines, and migrants, with a greater incidence on women and children. This has been referred to as the offence of "wearing a face". Discrimination expresses itself in many ways, including through the denial of access to adequate housing, food, health care, quality education and decent employment, but also the existence of obstacles in gaining access to justice and the due process of law, participating in social and political life and enjoying the freedom of association and assembly, and the criminalization of rights defenders.

28. There is a high level of prejudice among the population at large. The Special Rapporteur notes the implementation by the National Institute against Discrimination,

Xenophobia and Racism of programmes to foster cultural exchanges and address general stigma with regard to indigenous peoples, Afrodescendants, migrants, religious diversity and the Jewish, Arab and Armenian communities. The Special Rapporteur acknowledges efforts made to raise awareness, including in schools. For example, as part of the campaign entitled "The school against racism", implemented in conjunction with the children's channel of the Ministry of Education, an animated series was disseminated entitled *Iguales y diferentes* (equal but different), based on guidelines for children on preventing discriminatory practices.

29. The discrimination map produced by the Institute found that education, health and employment were the sectors where discrimination had been perceived to be the most severe. It highlighted that discrimination had mainly been experienced in schools, public hospitals but also public transportation and in certain geographic areas, including peripheral urban areas and rural dwellings.

30. The study also showed that, in addition to the persisting discrimination against certain groups, there had been a significant number of discriminatory acts based on religious grounds. Muslims recorded the highest levels of discrimination based on religious identity, mainly because of the stereotypical representations of that group linked to prejudices related to fundamentalism and terrorism. Given the low number of Muslims in Argentina, the Institute pointed to the role of the media in shaping stigmatization.

31. The Special Rapporteur notes with concern the grave impacts that the denial of access to adequate health-care services, but also education and adequate economic activities, have had on indigenous communities, who at times live in extreme poverty, but also on migrants and people of African descent. Furthermore, difficulties in settling land ownership disputes continue to put a strain on indigenous peoples' capacity to fulfil their basic needs, including access to food and to clean water.

A. Indigenous peoples

32. The Special Rapporteur is alarmed by the severity of the deprivations still experienced by indigenous communities. In its 2014 annual report, the Office of the Ombudsperson highlighted that indigenous peoples had less access to economic and social rights. The report voiced concerns over the lack of access to safe drinking water, food, health care and education. The most severe expression of these deprivations could be the situation of malnutrition in some indigenous communities.

33. Discrimination against indigenous peoples in Argentina is both structural and horizontal. Many Argentinians believe that indigenous peoples should make a greater effort to integrate within society, thus denying their right to identity in clear contradiction with constitutional provisions. This also shows that efforts to raise awareness on the rights of indigenous peoples and fostering a multicultural society remain insufficient. Indigenous peoples have also generally suffered from difficulties in effectively participating in decision-making, including on matters that directly affect them. More alarming are the various forms of repression of the exercising of freedoms of expression, association and assembly, often in land-related matters.

Access to economic, social and cultural rights

34. Regarding access to health, indigenous people, especially in northern provinces, are facing difficulties owing to the implementation of health policies disregarding their cultural identity. In public health centres, the presence of translators and/or interpreters remains rare, constituting an impediment to proper doctor-patient communication, obstructing diagnosis and the administration of appropriate medical treatment. Little regard has been given to indigenous culture, including traditional medicinal practices. This lack of cultural sensitivity at times represents a disincentive for seriously ill patients to seek medical attention and particularly affects women's sexual and reproductive rights. It was also reported that, in some cases, medical personnel have deliberately ignored severely ill patients and their families or given little regard to pain management during treatment. The Special Rapporteur received a testimony from a mother who had lost her daughter because

the medical personnel refused to treat her for three days and only reacted when the patient was in agonizing pain. The absence of equipment and medication was also raised. The Ombudsperson, for example, reported that a field visit late in 2015 to several departments mostly inhabited by indigenous peoples in the Chaco province revealed serious impediments in gaining access to secondary health centres, due to the limited availability of ambulances, qualified doctors and basic medical supplies and medication to treat common affections. The investigation also highlighted the total absence of an intercultural perspective in public health policies.[11]

15. It should be noted that the United Nations Children's Fund (UNICEF), in its 2015 country report on Argentina, underscored that between 1990 and 2014 child mortality among indigenous children aged under 5 years had stagnated at three times the national average, which itself had decreased over the same period.[12] Recently, an emerging trend of possible high incidence of suicide among indigenous young people was to be investigated by the organization.

16. A research published in 2013 by the University of Buenos Aires presented alarming data regarding the malnutrition of indigenous children in the province of Salta. The study, carried out from June to August 2011 in 74 communities, showed a significant prevalence of chronic malnourishment among indigenous children of up to 62.4 per cent of 1 to 4-year-olds, and 37.5 per cent, of those aged under 1 year. In total, 50 per cent of indigenous children aged under 1 year and 70.8 per cent of those aged 1 to 4 suffered from some type of nutritional deficit. The Special Rapporteur on the rights of indigenous peoples had already reported in 2012 concerns about the situation in the Chaco province, which was ordered by the National Supreme Court to take a series of actions to ensure that the inhabitants of the region receive health care and adequate food. Unfortunately, cases of death linked to malnutrition of indigenous children were again reported both in Chaco and Salta in 2015.

17. While visiting the northern provinces of Salta and Formosa, recurring complaints were received about access to education, namely, the absence of adequate proximity educational facilities, the absence of qualified teachers to implement the bilingual intercultural education enshrined in the Constitution, the high level of school dropout or even instances where children had passed a class without having really achieved the required level of learning. Furthermore, situations of stigmatization and isolation of indigenous children in mixed schools were reported, with little effort from educators to foster a culture of acceptance, mutual respect and understanding among students. The Special Rapporteur notes with grave concern the absence of qualified teachers from indigenous communities nationwide, which is a serious obstacle to the implementation of bilingual intercultural education. In general, teachers receive very little training on intercultural education and indigenous themes. Failure to implement an intercultural bilingual education has de facto excluded a significant number of indigenous children from having access to adequate education.

18. Moreover, the large differences between the availability of adequate educational facilities in urban versus rural areas disproportionally affect indigenous children. For example, in Salta, the local Ministry of Education noted that until very recently there had been no secondary schools in rural areas. In October 2013, the Ombudsperson was called to visit a community in the province of Salta, where it found that the infrastructures of the local school were in clear violation of the rights of more than 500 children, mostly indigenous. The only response received was from the provincial Ministry of Education, which mentioned that a refurbishment project would be introduced in the 2015 budget proposal. This example, among many similar ones, is telling of the little commitment by the various institutions to prioritize actions to immediately stop the violations endured by indigenous peoples, including children.

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[11] See Defensor del Pueblo de la Nacion, *Informe Anual 2015* (Buenos Aires, 2015), p. 44. Available from www.dpn.gob.ar/documentos/anuales/anual2015.pdf.

[12] See UNICEF, "Informe Anual de Actividades, Argentina, 2015", p. 10. Available from www.unicef.org/argentina/spanish/pdfs_informeAnual2016.pdf.

39. Although performance data are collected, including the class repetition rate, they are not disaggregated and simply compare rural and urban performances. At higher education levels, it is evident that minority groups, especially indigenous peoples, are not represented either as students or faculty.

40. Access to safe drinking water remains a challenge for a number of communities. The Special Rapporteur conducted a follow-up visit to the community of Nam Qom, in Formosa, which had already received several visits, including by the Inter-American Commission on Human Rights, regarding its living conditions and land struggles. The community is located 30 minutes from the Governor's building yet still does not benefit from running water, nor adequate sanitation or housing. The community has evidently been neglected by provincial authorities and resembles a slum. The Rapporteur notes the serious discrepancy between the progress reported in all sectors by the local government and the complaints received from local civil society actors and indigenous communities that travelled from across the province to meet with him. This is not an isolated case. The Rapporteur noted a paternalistic approach to addressing indigenous questions that favours a welfare response rather than a strategy to sustainably empower those communities.

Violations of civil and political rights

41. The Special Rapporteur is seriously concerned about the information regarding the continued harassment and violence directed towards indigenous communities, both by government agents or made possible through their complicity or inaction. These have often taken place in the context of the ongoing land disputes previously described by human rights mechanisms that have reviewed Argentina. While the adjudication of these cases by the local courts hardly ever goes in the favour of the communities, there is a continued criminalization of communities who often stage protests by blocking national roads to be heard since they have very few means of making their claims visible. These protests and demonstrations have been violently repressed by excessive use of force by local security forces, at times using tear gas and rubber bullets against crowds of elders, women and children. The continued criminalization of community leaders and defenders is also very worrisome. This further contributes to reinforcing horizontal discrimination and stigmatization of indigenous peoples. It was reported that at times local authorities had fostered resentment against indigenous peoples.

42. The Special Rapporteur would like to bring attention to section IV. A of the 2012 report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (A/HRC/21/47/Add.2), in which he describes violations related to land tenure. The Special Rapporteur is highly disappointed that no progress has been made in that regard and — given that the legal provisions ordering the suspension of evictions of indigenous communities from the lands they occupy is soon to expire — he reiterates the recommendations contained in the aforementioned report.

43. Most worrisome is the continued persecution of certain communities. On 30 September 2015, several members of the Qom Potae Napocná Navogoh "*La Primavera*", in Formosa, were wounded by the provincial security forces following a blockade by a group of 10 women with their children who were claiming their right to decent housing. This community had already been subjected to violent repression in 2010 in similar circumstances leading to the death of a community member and a police officer. In 2011, the Inter-American Court of Human Rights issued precautionary measures No. 404-10 instructing the protection of the community. Their leader, Felix Diaz, still faces a number of criminal charges, and his family is subjected to harassment. This is an emblematic case yet believed to be representative of many others as documented by the organization Amnesty International.[14]

44. The Special Rapporteur also received information about a trend of reprisal against lawyers providing legal counsel to indigenous communities. He heard, for example, about

[14] In 2015,Amnesty International published a mapping of 200 cases of conflicts in Argentina involving indigenous communities. See http://territorioindigena.com.ar/.

the intimidation to which the local delegate of the National Ombudsperson Office in Formosa had been subjected, including attempts to discredit her competence.

45. Indigenous peoples are still underrepresented in all spheres of Government. The Special Rapporteur systematically heard that data in this regard had not been collected. There was a general acknowledgement that very few indigenous peoples figured in the various branches of Government, including at the federal level.

46. Few efforts have been made to implement selection modes that are in line with indigenous cultural practices to select their representatives sitting in specialized agencies catering to them. In Formosa, the institution dedicated to indigenous issues is composed of nine democratically elected directors, of which only three members are from indigenous communities at present. However, the legitimacy of the indigenous representatives is highly contested by community members as the way they were selected is not considered to be in line with indigenous traditions. This situation has fostered serious divisions within indigenous communities, which denounce a policy of electoral clientelism. This further stigmatizes the communities who demands respect for their cultural identity and understanding of life and constitutes an additional obstacle to having their claims heard. Consultation also remains problematic, specifically regarding the implantation of economic operators on traditional lands, but also in the design and update of laws that directly influence indigenous interest.

47. Although Argentina recognizes a certain number of indigenous communities, the Nivaclé claim that they have been denied recognition and therefore cannot have access to national identification cards, which in turn keeps them from gaining access to public services in the province of Formosa.

B. Migrants and asylum seekers

48. According to the 2010 census, the foreign nationals represent 4.5 per cent of the population of Argentina. Migrants mainly come from neighbouring countries. Only 0.2 per cent of foreign nationals are from Africa and Oceania, and further 0.5 per cent from China. The Special Rapporteur notes that migrants from European countries integrate easily into society, while others have faced challenges.

49. The Special Rapporteur is concerned that, despite the progressive immigration law, migrants — both documented and undocumented — continue to face racial discrimination and xenophobia in areas such as education, access to health care, public services, housing and employment. Physical attacks against migrants, including murder, have been reported. In Argentina, as elsewhere, migrants have been scapegoated for the ills of society and in recent years politicians have used xenophobic or stigmatizing rhetoric against certain migrant populations.

50. The Special Rapporteur was informed that some government officials have made statements in the media accusing migrants of "being responsible for the drug trafficking in the country",[15] or in general taking part in criminal activities.[16] Words such as "we are infested with foreign criminals"[17] testify to the mounting xenophobic discourse that some public figures have used in local media.

51. Concerns were also raised about a trend of social and institutional discrimination, particularly affecting migrants from China, Colombia, the Dominican Republic and Senegal. Colombians have been portrayed as drug traffickers and subjected to difficulties in entering Argentina, unlike other nationalities in the Southern Common Market (MERCOSUR) and in contradiction with the migration law.

[15] See article in *La Nación* (8 May 2014), www.lanacion.com.ar/1688707-miguel-pichetto.

[16] Ibid.

[17] See article in *La Nación* (19 August 2014), www.lanacion.com.ar/1719966-sergio-berni-el-fin-de-semana-detuvimos-a-mas-de-60-extranjeros-que-vienen-a-la-argentina-unicamente-a-delinquir.

Migrants from the Southern Common Market (MERCOSUR)

52. In total, 40 per cent of the total migrant population surveyed by the National Institute against Discrimination, Xenophobia and Racism declared that they had suffered discrimination, mainly related to nationality, poverty and skin colour. Although the law facilitates residency status for migrants from neighbouring countries, integration programmes remain insufficient and they had been marginalized. They often face de facto ghettoization, living in communities in the peripheral urban areas. According to the Institute, some nationalities are more likely to experience discrimination, such as Bolivians. They are constrained to taking low-skilled jobs and are often exploited. The number of fatal workplace accidents in recent years testifies to the dangerous work conditions that migrants are exposed to, including children.[18] Paradoxically, the Institute's discrimination map revealed that 41 per cent of those interviewed held the belief that "workers who come from other countries are taking away jobs from Argentinian workers".[19]

53. The Special Rapporteur was informed that, despite the existing legal protection, migrants sometimes face difficulties in gaining access to basic services, particularly from private-service providers. An example was given of a cable television provider that simply refused to serve customers living in certain areas, claiming it was too dangerous for a technician to perform the necessary installations in those locations. The Ministry of Public Defence also provided information on a long-pending judicial case against a transportation company that stopped its evening service to a particular area with a high concentration of migrant workers. More worrisome was the refusal of ambulances to provide services in certain areas citing security concerns. Access to judicial remedies also often remains near impossible for such populations, even cases of murder.[20]

Migrants from outside the Southern Common Market (MERCOSUR)

54. Since the 1990s, Argentina has been a destination for migrants from Africa and outside MERCOSUR, such as the Dominican Republic and Haiti. The Special Rapporteur notes the efforts made by the Government to regularize a number of migrants from Senegal, with the implementation of a special regime implemented early in 2013 leading to 1,697 applications, of which 1,391 had been resolved by January 2014. Similarly, since 2004, of the 12,598 requests for regularization from Dominican nationals, 6,298 have been given residency. However, those were one-time exercises, and many Senegalese and Dominicans remain in irregular situations making them vulnerable to discrimination and exploitation.

55. While the presence of Africans in quantitative terms is considerably less than other migrants, they are highly visible because Argentina perceives itself as a country without an endogenous black community. For black migrants, the process of inclusion in local society has been a complex one. Many African migrants work mostly in the informal sector, including sidewalk vending, which has exposed them to harassment and extortion by the police and local gangs, and widespread horizontal stigmatization. Access to housing has been very difficult for them, and they often live in slums or crowded city boarding houses, where they are subjected to excessive rents.

56. The Special Rapporteur is particularly worried about the escalation of violence against this population group and the total absence of mechanisms of protection that are accessible to them. In March 2016, Massar Ba, leader of the Senegalese community in the city of Buenos Aires, died a brutal death. Civil society organizations have expressed concerns that his death occurred after he had filed a complaint against the metropolitan police for the persecution of Senegalese street vendors. Following his complaint, he was evicted by the police from the community home where he had been living. In the days preceding his tragic death, he participated in a protest with other sidewalk vendors to

[18] See report on compliance with the ICERD (paras. 58 and 59), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/ARG/INT_CERD_NGO_ARG_25858_E.pdf.

[19] See Instituto Nacional contra la Discriminación la Xenofobia y el Racismo, *Mapa de la Discriminación. Segunda Edición* (Buenos Aires, 2014), p. 77.

[20] See footnote 18.

denounce police persecution in the Flores neighbourhood. Civil society groups denounced irregularities in the investigation of the case. The impossibility for the association he headed to present itself as a plaintiff had meant it was unable to gain access to any information regarding the investigation.

Asylum seekers

57. According to the Office of the United Nations High Commissioner for Refugees, in the period 2011-2015, Syrians represented 39 per cent of the refugee population in Argentina. The Special Rapporteur was informed by the Ministry of Foreign Affairs and the National Commission for Refugees that the country intended to receive a greater number of Syrian refugees and that a decree had been issued to facilitate this.

58. The law provides for free access to education and health care for refugees. However, organizations working with refugees have reported challenges relating to the absence of a comprehensive settlement scheme, particularly in terms of gaining access to housing, the labour market, social security or even adequate health coverage, including for children. As a consequence, refugees are likely to be exploited in the workplace and at a greater risk of falling into the informal economy, which further contributes to their stigmatization as potential "criminals".

59. The Ministry of Public Defence (*Ministerio Público de la Defensa*) documents[21] possible discriminatory practices in the processing of asylum claims, based on the gender identity, sexual orientation or nationality of the claimant. Certain nationalities seem to be systematically subjected to suspicion regarding the validity of their claims, including Cubans, Dominicans (especially women) and Senegalese nationals. The Ministry also indicated that, outside of Buenos Aires, translators are rarely available to assist non-Spanish-speaking asylum seekers, who are reportedly not systematically informed of the procedure and their right to free legal counsel.

C. Afro-Argentines

60. Until recent years, the very existence of Afro-Argentine people as a component of society had been negated in Argentina. It is believed that the wars of independence took a serious toll on the number of Afrodescendants in the country. The 2010 census found that approximately 150,000 people claimed to be of African descent, with 92 per cent of those born in Argentina. In total, 70.3 per cent of that population is thought to be concentrated in the province of Buenos Aires and the cities of Buenos Aires, Entre Ríos, Santa Fe and Córdoba. However, those figures have been contested as an underestimation because of the way the census was administered.

61. Society at large still does not recognize the existence of Afro-Argentines. It was reported that in 2002 an Afro-Argentine woman, who was president of a civil society organization, had been detained at the international airport as immigration officers considered that her passport was forged because they did not believe the actual existence of Afro-Argentines. Although she filed a complaint, she never received a response or reparation. The discrimination map developed by the National Institute against Discrimination, Xenophobia and Racism[22] shows that 38 per cent of those interviewed admitted an aversion toward people of African descent, while only 3 per cent acknowledged that this group was most affected by racial discrimination. By contrast, 61 per cent of the Afrodescendants interviewed acknowledged having been subjected to discrimination.

62. Civil society organizations pointed to the absence of educational content on African history, ignorance about the historical contribution of African people to State building and the stereotyped folkloric representation that society holds of them. Today, Afro-Argentines

[21] Information provided by the Ministry of Public Defence.

[22] See footnote 19.

are amalgamated with the more recent African immigrants and experience similar difficulties in terms of stigmatization and access to decent employment and public services.

63. The Special Rapporteur notes with appreciation programmes implemented by the National Institute against Discrimination, Xenophobia and Racism to promote historical redress and reparation for the Afrodescendent community by facilitating their participation in the public sphere. It is also noted that 8 November has been established the National Day of Afro-Argentines and African culture. Moreover, in cooperation with the Office of the Media Ombudsperson, civil society organizations developed 10 recommendations aimed at the mass media in order to prevent the use of racist, discriminatory or stereotypical language or images in various communication outlets.

64. Despite a number of positive policies, racism and harassment of black people in the streets and the non-implementation of policies tailored to redress their situation persist. Most of the measures implemented seem to be cultural, which are necessary in shaping the perception and opinion of the majority. The absence of a real political commitment has translated into the absence of concrete actions and even efforts made at blocking certain initiatives. For example it was reported that in 2010 the now National Minister of Education banned the use of the Manual of the Bicentennial in the schools of the city of Buenos Aires arguing that it was too focused on indigenous peoples, people of African descent, women and workers.

V. Challenges in tackling racism and discrimination

A. Invisibility

65. The Special Rapporteur notes with grave concern the continued invisibility of the most marginalized groups, especially indigenous peoples. This invisibility is noticeable both at the level of public institutions where indigenous peoples, migrants and Afro-Argentine people are not at all represented, and in society at large. That reality is captured in the discrimination map developed by the National Institute against Discrimination, Xenophobia and Racism, which found that, according to the perception of respondents, of the 14 most discriminated against groups of individuals, indigenous peoples are ranked eighth, right behind people of African descent and far behind persons perceived to be discriminated against because they are overweight (ranked first).[23] While only 49 per cent of respondents perceived indigenous peoples to be subjected to discrimination, 77 per cent of interviewed indigenous peoples reported having experienced discrimination. The law on indigenous communities is one of the least known legal instruments, with only 12.7 per cent of the population aware of it. The discrepancies between perceived and experienced discrimination apply to all groups subjected to racial discrimination.

66. Overall, 33.4 per cent of the population interviewed by the Institute considers that indigenous peoples should assimilate with the rest of the population, a perception that is more widespread in regions where indigenous peoples are numerous, including provinces in the north-east and north-west and in Patagonia.

B. Obstacles to gaining access to justice

67. The Ministry of Public Defence concluded that discrimination constitutes both a cultural and structural obstacle to gaining access to justice.[24] Indigenous peoples have not benefited from the measures necessary to guarantee due process while defending their rights. Major obstacles include the absence of interpreters and translators; limited

[23] Ibid., p. 48.

[24] See Ministerio Público de la Defensa, *Acceso a la Justicia de los Pueblos Indígenas* (Buenos Aires, 2010), www.mpd.gov.ar/pdf/publicaciones/biblioteca/014%20Acceso%20a%20la%20justicia%20Indigenas.pdf.

availability of legal assistance specialized in indigenous rights; difficulties in producing proof, especially in civil proceedings; and most importantly the prejudice of judicial officers.

68. The obstacles in gaining access to fair and impartial justice are also experienced by migrants. Recently, a first jurisdiction magistrate in La Plata considered the status of foreign national to be an aggravating circumstance in his sentencing, and in clear contradiction to constitutional provisions. He argued that the State holds fewer obligations to migrants than it does to nationals. The defendant in question was a transgender Peruvian national. The Special Rapporteur notes that transgender migrants have also experienced high levels of prejudice, discrimination and criminalization. He notes with appreciation the actions taken by the National Institute against Discrimination, Xenophobia and Racism to address that specific case.

69. The Ministry of Public Defence provided a long list of cases involving indigenous peoples or migrants in which provincial and national courts had failed to rule, delayed the consideration of cases or not followed due process. Some cases had been pending for a long time before the Supreme Court. In that regard, the Rapporteur notes with concern the lack of acknowledgement by the National Supreme Court of racial discrimination as a cause of denial and violation of rights.

70. According to the data produced by the Ministry of Justice and Human Rights, between 2004 and 2013, no sentences were handed down relating to the violation of the anti-discrimination law.[25] Similarly, the Ministry of the Interior reported that it had not collected sufficiently disaggregated data on the 194 cases relating to violations of the anti-discrimination law between 2012 and 2013. This may also reflect the lack of access to justice by groups that are discriminated against.

71. The Public Prosecutor's Office reported that, between 2013 and 2016, 32 cases had been registered with a violation of article 2 of the anti-discrimination law. Of those 32 cases, 21 had been filed in first jurisdiction courts and 11 had been dismissed. Over the same period, 47 cases had been registered for the offence of promoting or inciting persecution or hatred against a person or group of people because of race, religion, nationality or political ideas, but no disaggregated data was provided on the respective grounds of discrimination.

72. The Special Rapporteur notes with appreciation the programme on cultural diversity established by the Ministry of Public Defence in 2008 with a view to removing the obstacles to gaining access to free public legal representation for vulnerable groups, especially indigenous peoples. The sensitization of public defenders to a set of fundamental principles should be emulated by other judicial actors.

C. Racial profiling

73. The Special Rapporteur was informed about a trend whereby the Buenos Aires Metropolitan Police and Argentine Federal Police enforce profiling in identity checks on the streets. The practice disproportionately affects migrants and people of African descent. It appears that racial profiling has increased following a 2015 decision by the Buenos Aires Superior Court of Justice to revoke a ruling that had declared null and void detention linked to identity checks, arguing that the Federal Police could randomly stop people for identification checks without any suspicion of crime, invoking the Organic Law of the Argentine Federal Police. This legislation confers to the Federal Police broad implicit powers to act according to its discretion as long as its exercise is essential "for urgent motives of general interest regarding public order and security and the prevention of crime".[26]

[25] See annex to State party report, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fADR%2fARG%2f22733&Lang=en.

[26] See Decree 6580/58 of 31 July 1958, Chapter V.

74. Information was provided about the disproportionate detention of persons living or operating in disadvantaged neighbourhoods, leading to de facto discrimination against persons on the basis of their appearance. It was reported that, in recent months, detentions for identity checks without grounds for suspicion had had a greater impact on transgender migrants and on persons of Senegalese and Dominican origin.

75. Senegalese street vendors, as mentioned above, are reported to be systematically targeted, harassed and humiliated on a daily basis by police. The Buenos Aires Ministry of Public Defence has warned of the systematic nature of this persecution. Because the police use racial profiling to register violations of laws relating to "unauthorized street vending", the claims are often dismissed by judges for lack of merit. In 2013, the Prosecutor General's Office created the Complex Investigation Coordinating Unit, which intervenes in investigations of street vending by ordering raids in the homes of Senegalese nationals and confiscating their merchandise and personal items, the majority of which are never recovered.

76. The Special Rapporteur notes the absence of a diverse police force. In a meeting with the Ministry of the Interior, it was revealed that the shift towards a more human rights-friendly and citizen-oriented police force is only now being initiated. While some efforts have been made to increase the representation of transgender and persons with disabilities, little consideration has been given to promoting the representation of ethnic minorities, such as indigenous peoples, peoples of immigrant origins and Afro-Argentines.

D. Data collection

77. In 2010, the national census included questions on indigenous identity and for the first time on Afrodescendants. However, concerns were raised that the results of the census were very approximate given that the questions on ethnic identity were only included in the extended version of the census forms submitted to only 10 per cent of the population. The National Institute for Statics in a report published in September 2010 denounced irregularities with the design of the census and the way it had been administered mainly owing to the interventionism of the State in the functioning of the Institute beginning in 2007, thus jeopardizing its capacity to work independently and produce reliable and objective data.

78. Disaggregated data on socioeconomic indicators for all minority groups, including indigenous peoples, remains lacking. The Special Rapporteur also notes that the various United Nations agencies working in Argentina have not disaggregated socioeconomic data according to ethnic groups. It is therefore very difficult to develop tailored policies in the absence of a clear diagnosis of the issues at hand.

79. Although there have been efforts by institutions such as the National Institute against Discrimination, Xenophobia and Racism or the various Ministries to gather data, the levels of disaggregation remain insufficient to reveal progress made, or lack of thereof, in improving the situation of historically discriminated groups. The National Institute for Statics informed the Rapporteur that it was in a restructuring process. The Special Rapporteur hopes that this will be seized as an opportunity to develop the systematic collection of ethnically disaggregated data on socioeconomic indicators. Efforts are also needed to accurately count the various population groups in Argentina, which will provide them with visibility and facilitate fair representation.

E. Stigmatization

80. Several concerns were raised about the role played by the media in stigmatizing certain populations and fostering xenophobia among the public. The insistence of the media on highlighting people's nationality or residential status while reporting on crimes was highlighted. According to data published by the Office of the Media Ombudsperson, for the period 2013-2015, there were 120 news stories on themes related to migrants, 63 of which were associated with police action.

81. Research conducted by the Media Ombudsperson for the City of Buenos Aires shows that social groups such as migrants, Afrodescendants, indigenous peoples, farmers and the lesbian, gay, bisexual and transgender community are completely marginal in the media. Moreover, it appears that these categories of people have never acted as sources of information in aired stories. On the contrary, when the groups are treated as topics, their own perspective is never sought and generally they are associated to conflict with the law and discussed by others, including security forces, government officials or witnesses of incidents. In this regard, it is also noted that news programmes do not provide socially relevant information to these population groups. The Special Rapporteur hopes that the current Government will continue to support the work of the Media Ombudsperson and use its studies to encourage media actors to provide equal opportunities to all components of society.

82. In Argentina, the configuration of discriminatory sociocultural patterns in audiovisual media translates into the systematic exclusion of some social groups from the media and hinders participation and equal exercise of freedom of expression. This exclusion mirrors the existing social inequalities and amplifies it. It hinders participation in social and political processes and debates. This has a silencing effect since the voices and demands of these marginalized groups are devalued by mainstream media, thereby further entrenching the invisibility of their condition.

83. A study has shown that, in 2010 and 2011, in the context of the deaths of several indigenous children due to malnutrition, referenced earlier, some media and provincial authorities pointed to the cultural practices of the affected indigenous communities as the potential cause. This not only reportedly undermined the debate on the real causes of the issue but also set forth a perverse mechanism of stigmatizing victims and unjustly shifting responsibility.[27]

84. The Special Rapporteur was informed of instances when public figures had made stigmatizing comments. More recently, the National Minister of Education and Sports was reported to have labelled the opening of a new medical training facility in rural areas as the "conquest of the desert", making reference to an infamous military campaign that had resulted in the slaughter of indigenous peoples in the 1880s, representing a milestone in the "whitening" of Argentina. The Minister in an effort to correct himself allegedly said that the new conquest of the desert would not be won with a sword but through education, which is dissonant with the commitment to intercultural bilingual education and the recognition of historical injustices in the school curriculum.

VI. Good practices in fighting anti-Semitism

85. The Jewish community is well integrated in Argentina. The head of the Human Rights Secretariat of the Ministry of Justice and Human Rights, and former head of the Delegation of Argentine Jewish Associations, informed the Special Rapporteur that there was no widespread expression of violent anti-Semitism in Argentina.

86. The Jewish Community in Argentina has good interactions with the different government agencies and engages actively in capacity-building to fight discriminatory practices in public spheres. This allows for the early and effective reaction to any expression of anti-Semitism.

87. The Delegation of Argentine Jewish Associations receives reports of anti-Semitism and discrimination in general and publishes the resulting data, in addition to referring the cases to the relevant authorities. The Internet is the main platform on which anti-Semitic expression has been experienced (47 per cent of complaints received) while such expressions have been declining in the public sphere.

88. In the city of Paraná, province of Entre Ríos, four people were arrested in April 2016 after making anti-Semitic graffiti and Nazi signs in a public park. The local government

[27] See footnote 18, pp. 4 and 5.

quickly denounced and condemned the hateful nature of the offence. The National Institute against Discrimination, Xenophobia and Racism has also been very proactive in combating neo-Nazi groups and hate speech on the Internet and fostering religious tolerance and interfaith dialogue.

VII. Conclusions and recommendations

89. **Argentina has signed the Inter-American Convention against All Forms of Discrimination and Intolerance and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance. The Special Rapporteur urges the Government to take measures to ratify those two Conventions.**

90. **At the domestic level, Argentina has an extensive legal and institutional framework to tackle discrimination, racism and xenophobia. The National Institute against Discrimination, Xenophobia and Racism and the Office of the Ombudsperson have developed tailored approaches to tackling the issue of discrimination and have maintained an open dialogue with civil society organizations facilitating the discussion on persisting violations.**

91. **Despite the long-established mechanisms to redress the situation of historically marginalized groups, their situation has not appreciably improved and in some cases has worsened owing to dire economic conditions and exacerbated land conflicts. The absence of disaggregated socioeconomic indicators remains problematic. Moreover, an assessment of the impact of the 2005 National Plan against Discrimination has yet to be undertaken.**

92. **The Special Rapporteur urges the new administration to prioritize minority rights in their human rights agenda, as the situation of indigenous peoples and other marginalized groups requires immediate attention from the highest levels of provincial and federal governments. This is crucial if the country is to meet the goals of the 2030 Agenda for Sustainable Development and the commitment to leaving no one behind.**

93. **In the spirit of constructive dialogue, the Special Rapporteur makes the following recommendations, which complement the ones previously made by various human rights mechanisms, including the Committee on the Elimination of Racial Discrimination in 2016.**

On the legal, policy and institutional framework

94. **The Special Rapporteur reiterates the recommendation to elevate racial discrimination to a criminal offence while adopting the definition contained in the International Convention on the Elimination of All Forms of Racial Discrimination.**

95. **The 2005 National Plan against Discrimination, which is a good practice, needs to be thoroughly assessed and new objectives defined with the active participation of concerned groups, who should also be duly involved in monitoring progress.**

96. **While efforts by the National Institute against Discrimination, Xenophobia and Racism are commendable, it should strengthen its actions with regard to violations experienced by indigenous peoples. It should expand its reach to the most remote areas of the country and pay special attention to indigenous peoples in addition to other vulnerable groups, including people of African descent, migrants and those subjected to cross-cutting vulnerabilities, such as women and lesbian, gay, bisexual, transgender and intersex persons. Furthermore, efforts to fight horizontal prejudice need to be strengthened in order to be more effective.**

97. **The Special Rapporteur invites the Ministry of Justice and Human Rights and the National Institute against Discrimination, Xenophobia and Racism to facilitate the development of strong civil society organizations and networks among those marginalized groups that are not well organized with a view to empowering them.**

98. **The Special Rapporteur urges the Government to establish affirmative action measures to ensure the effective representation of all minority groups in the highest decision-making positions, and in particular in positions of influence, such as in education (including at the university level), the judiciary, legislatures and executive positions; but also among the security forces, including the police at the federal and provincial levels. This is particularly urgent for indigenous peoples as the current modes of their participation have largely failed to provide them with the voice and visibility necessary to remedy their long history of exclusion and marginalization.**

99. **The absence of reliable data and statistics remains problematic, and a state policy must be established that requires the National Institute for Statics to design protocols for the collection of comprehensive reliable disaggregated data on a wide range of indicators, in coordination with all ministries and specialized institutions. The Special Rapporteur invites the Institute to engage with all stakeholders concerned in designing the questionnaires for the next census, especially with regard to questions related to identification.**

100. **The Special Rapporteur would like to suggest that the National Institute against Discrimination, Xenophobia and Racism involves the National Institute for Statics in developing its discrimination map with a view to insuring the necessary levels of data disaggregation while observing the safeguards needed while collecting identity-related data.**

Historically marginalized groups

101. **It is urgent that the Government develop a comprehensive whole-of-Government policy implemented at the federal and the provincial levels to ensure the protection of indigenous peoples' rights.**

102. **The bilingual, intercultural education envisaged by the Constitution has to be implemented without further delay. The Ministry of Education needs to involve indigenous communities in all stages of designing and implementing curricula so that effect.**

103. **The National Institute of Indigenous Affairs should be reformed and its mandate strengthened with wider decision-making powers and a greater reach at provincial levels. Its composition should include legitimate representatives of indigenous communities in order to foster trust among its primary constituents. Its actions regarding the registration of indigenous lands and protocols in place in that regard should be reviewed in order to become more effective taking into account the opinion of all stakeholders concerned.**

104. **The Special Rapporteur understands that Nivaclés are a people also present in Paraguay, bordering the province of Formosa, and suggests that the State further investigate the claims of the Nivaclé in Argentina in an effort to prevent statelessness.**

105. **The Special Rapporteur invites the Government to officially launch the Decade of People of African Descent nationally and finance specific activities in consultation with the community.**

106. **The State should ensure that the operations carried out by its agencies do not have the purpose or consequence of stigmatizing migrants, but rather facilitate their regularization.**

107. **The Special Rapporteur recommends that the Government establish a comprehensive programme for refugees and migrants to facilitate their access to adequate housing, health care and language classes and training to foster integration into the labour market. Such a programme should also include regular dialogues between migrants and host communities in order to dissipate mistrust, stereotype and foster a culture of acceptation.**

On the administration of justice

108. **The Special Rapporteur recommends that the Government establish a multicultural approach to the administration of justice at the federal and provincial levels. This requires the establishment of specialized courts to deal with indigenous issues, the training of specialized judicial professionals and the integration of minority groups in the judicial system. It also entails providing interpreters, translators and free legal counsel through judicial processes.**

109. **The Special Rapporteur calls on the Supreme Court to play its role in setting jurisprudence in cases presenting evidence of discrimination as a cause of denial of rights.**

110. **The Special Rapporteur urges the Government to take immediate measures to investigate the many cases of repression against minority rights defenders and their persecution by federal and local authorities. The fight against impunity should be proactive, and specialized investigation protocols and resources should be dedicated to violent crimes against historically discriminated groups, especially indigenous peoples.**

111. **The Special Rapporteur recommends that the Government undertake measures to put an end to racial profiling, strengthen the legal framework, including a specific prohibition of racial profiling, and establish clear criteria for law enforcement agents for initiating and conducting stops and identity checks.**

112. **While the Special Rapporteur recommends that the Government ensure adequate resources for human rights and non-discrimination training with a practical dimension for law enforcement agents, he recalls that addressing the problems of racial profiling also requires awareness-raising to inform individuals of their rights and particularly those groups likely to be profiled. Ethnic and cultural diversity within the security forces is also essential. More measures to improve police-community relations and build trust should also be implemented.**

113. **Ethnically disaggregated data on the use of stops and identity checks by law enforcement agents, including police forces, should also be collected. In that regard the Special Rapporteur encourages the Government to promote the implementation of good practices, such as the use of registration forms for the police to record all identity checks. Such forms could provide the victims of racial profiling with a record of their encounter with the police that could be used as a proof when seeking remedy.**

On hate speech and xenophobic discourse

114. **The Special Rapporteur acknowledges the good practice of establishing the Media Ombudsperson and encourages the media to work with the Ombudsperson and develop, in consultation with civil society, voluntary ethical codes of conduct and self-regulatory measures, policies and practices to combating racism.**

115. **The Special Rapporteur takes note with utmost gravity of the expression of xenophobic and stigmatizing discourse by public officials and politicians. He is of the view that xenophobic hate speech should be immediately sanctioned as this type of discourse is detrimental to fostering a culture of inclusion. He urges the State to sensitize its officials with regard to their responsibility in shaping public opinion and therefore refrain from propagating inaccurate, stigmatizing ideas about certain groups in society, and further encourages public figures to use their platforms to foster a culture of mutual understanding and tolerance and provide a positive narrative on the contribution of historical marginalized groups.**

116. **The media has an important role to play in promoting multicultural diversity, and the influence they have in shaping opinions and attitudes on ethnic groups should be used to promote tolerance and respect for diversity. The Special Rapporteur encourages the Government to ensure diversity of voices in the media through incentives and support to community media providing visibility and voice to victims of racism.**

117. **Furthermore, the Special Rapporteur encourages the Government in its efforts to prevent and eliminate hate speech and extremism on the Internet. In that regard, he recommends that it adopts an approach that duly protects and promotes freedom of expression and opinion.**

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Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia, which took place from 28 November to 9 December 2016, at the invitation of the Government.

In the report, the Special Rapporteur addresses the legal and institutional framework to combat racism and the different policies and initiatives undertaken against racism and xenophobia by the Government, national human rights institutions and civil society.

The Special Rapporteur analyses the main challenges the country has been facing in the fight against racism, racial discrimination, xenophobia and related intolerance, including issues related to the situation of indigenous peoples (Aboriginal and Torres Strait Islander peoples), expressions of racism and xenophobia in the public sphere and political debates on how to balance freedom of expression and protection against hate speech and discrimination.

The report concludes with recommendations to all relevant stakeholders.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his visit to Australia*

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* Circulated in the language of submission only

I. Introduction

1. At the invitation of the Government, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance visited Australia from 28 November to 5 December 2016, following up on a previous visit made by his predecessor in 2001 (see E/CN.4/2002/24/Add.1).

2. The Special Rapporteur travelled to Canberra, Australian Capital Territory, and to the cities of: Melbourne, Victoria; Sydney, New South Wales; and Alice Springs, Northern Territory. He also visited the Ntaria community in Hermannsburg, Northern Territory. He met with representatives of the federal, state and territorial governments, the federal and state legislative and judicial branches, and the security forces. He is honoured to have met the Assistant Minister for Social Services and Multicultural Affairs of Australia, the Minister for Multicultural Affairs and the Minister for Aboriginal Affairs of Victoria, the Minister for Multiculturalism of New South Wales and the Minister for Territory Families of the Northern Territory.

3. In addition, the Special Rapporteur met with the President and Commissioners of the Australian Human Rights Commission, representatives of the human rights commissions of Victoria and New South Wales, United Nations agencies and non-governmental organizations, community members and other groups and individuals working in the field of racism, indigenous community leaders, migrant workers, asylum seekers and refugees.

4. The Special Rapporteur wishes to express his sincere gratitude to the federal Government, in particular the Department of Social Services for its excellent cooperation and coordination in conducting the visit. He is also grateful to the different state and territorial agencies for their cooperation. He is indebted to his interlocutors from civil society and community organizations for the excellent cooperation they extended to him throughout the visit. He hopes his conclusions and recommendations will contribute to finding concrete and effective ways and means of addressing the challenges raised in the present report.

II. Background

5. The continent has been inhabited since prehistoric times, when people from South-East Asia arrived at least 40,000 years before the first Europeans landed in the seventeenth century. In 1770, James Cook took possession of the east coast in the name of Great Britain under the doctrine of *terra nullius*. Several colonial settlements were created — some of convicts, such as New South Wales, and some of free persons, such as Victoria. The colonization process found resistance among indigenous peoples when their lands were occupied; many were moved forcibly to mission stations to assimilate them to colonial beliefs and use them as cheap labour.

6. Australia was formally recognized as an independent Commonwealth in 1901 and granted responsible government by the colonial power, although indigenous peoples, together with non-European settlers, were denied citizenship and the right to vote and to take up military duties. The Immigration Restriction Act 1901 was the first act passed by the federal Parliament. It prohibited immigration of non-Europeans to Australia and formed the basis for the "White Australia" immigration policy, which prevailed until the 1960s. However, in the period after the Second World War more than 450,000 immigrants arrived, many from non-English-speaking countries, such as those in southern Europe, the Middle East and Latin America. At that time, the assimilation of new migrants was a priority, as they were expected to adopt the Australian way of life and learn English quickly. Few services were available at that time, apart from lessons in basic English.

7. In 1949, indigenous persons were given the right to enrol and vote in federal elections provided they were entitled to enrol for state elections or had served in the Australian Defence Force. In the 1960s, a new policy of integration, rather than assimilation, was promoted for migrants, as the country became more diverse, and ethnic organizations were seen as playing a role in that process. In 1962, the Commonwealth

Electoral Act 1918 was amended to allow all indigenous Australians the right to vote in federal elections, thus extending the franchise to Western Australia, Queensland and the Northern Territory. In 1975, the International Convention on the Elimination of All Forms of Racial Discrimination entered into force in Australia. Also in 1975, the Racial Discrimination Act was passed, prohibiting discrimination on the grounds of race, colour, descent or ethnic origin.

8. In 1992, the High Court, in the Mabo decision, overturned the concept of *terra nullius* and established that native title could exist over particular kinds of land — unalienated Crown land, national parks and reserves. The Council for Aboriginal Reconciliation was set up by the federal Government to foster better understanding between indigenous peoples and the wider Australian community. In 1995, the Racial Hatred Act was passed, with the aim of ensuring that people of all backgrounds could live free from racial vilification, intimidation and harassment.

9. In 2009, Australia became a supporter of the United Nations Declaration on the Rights of Indigenous Peoples, which it had initially voted against. In 2013, with near unanimous support, Parliament passed the Aboriginal and Torres Strait Islander Peoples Recognition Act. The Act includes a statement of recognition of the unique and special place of Aboriginal and Torres Strait Islander peoples, which reflects to a great extent the wording suggested by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. The Act contained a two-year sunset clause. In 2015, it was amended by the Aboriginal and Torres Strait Islander Peoples Recognition (Sunset Extension) Act to extend it until 2018.

III. Legal framework for combating racism

A. International human rights instruments and mechanisms

10. Australia is a State party to the major international human rights instruments: International Covenant on Civil and Political Rights and its Second Optional Protocol, aiming at the abolition of the death penalty; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child and its Optional Protocols on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography; Convention on the Rights of Persons with Disabilities and its Optional Protocol; Convention on the Prevention and Punishment of the Crime of Genocide; and Rome Statute of the International Criminal Court. However, it has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance. Australia is also a party to a number of conventions of the International Labour Organization (ILO): namely, 58 conventions and one protocol, including the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). However, it is not a party to the Indigenous and Tribal Peoples Convention, 1989 (No. 69).

11. Australia has made reservations and interpretative declarations with regard to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. Australia has made reservations to: articles 10 (2) and (3), 14 (6) and 20 of the International Covenant on Civil and Political Rights; article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 37 (c) of the Convention on the Rights of the Child; and articles 11 (1) (b) and (c) and (2) (b) of the Convention on the Elimination of All Forms of Discrimination against Women. Australia has made interpretative declarations in relation to articles 12, 14 and 18 of the Convention on the Rights of Persons with Disabilities and article 3 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

With regard to the International Convention on the Elimination of All Forms of Racial Discrimination, Australia made a reservation in connection with article 4:

> The Government of Australia … declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a).[1]

12. In 2015, Australia submitted its candidacy for membership of the Human Rights Council for the term between 2018 and 2020, for which elections will be held in 2017. Australia was reviewed under the universal periodic review for the second time in November 2016, during which the issues of indigenous peoples, asylum laws and refugee policies came under scrutiny (A/HRC/31/14). Australia issued a standing invitation to all special procedure mandate holders of the Human Rights Council on 7 August 2008.

13. The visit of the Special Rapporteur follows the one carried out by his predecessor in 2001. His predecessor noted in the report drawn up after his visit that racism and racial discrimination continued to affect indigenous peoples (Aboriginal and Torres Strait Islander peoples), particularly through a restriction on land rights, differences in educational attainment, access to employment, and health and housing conditions. Certain entities alleged that, according to the data, the measures and programmes designed to remedy those phenomena were insufficient and additional spending was required to redress the situation. The Special Rapporteur was particularly concerned by the situation of Aboriginal women revealed by a survey by the Australian Bureau of Statistics detailing the health disadvantages Aboriginal women faced. The Special Rapporteur also highlighted the issue of extinguishment of native land titles in Western Australia. Since August 1999, Western Australia had passed legislation confirming extinguishment on further titles and amendments that had led to the extinguishment of a further 1,300 of these grants.

14. The previous Special Rapporteur was concerned about the high proportion of indigenous peoples in the criminal justice system and the discriminatory nature of the mandatory sentencing laws in the Northern Territory and Western Australia. He mentioned the previous policy in Australia of removing indigenous children from their families, allegedly out of concern for their well-being, which had resulted in an entire generation being deprived of their cultural values and norms (the "stolen generation").

15. The previous Special Rapporteur finally discussed the different manifestations of racial discrimination affecting other communities. He noted that there were occasional manifestations of anti-Semitism as a result of the repercussions from Middle Eastern conflicts within Australian society. Australians of Arab origin expressed concern about the persistence of stereotypes, which sometimes led to racist acts and discriminatory treatment. He was informed and expressed concern about an ongoing campaign against refugees and migrants orchestrated by the media and sometimes backed by certain members of the federal Government. Migrants were accused of creating unemployment or invading Australia.

B. Legislation prohibiting racism, racial discrimination, xenophobia and related intolerance

16. The Constitution of Australia does not contain a bill of rights or a charter of fundamental freedoms, it provides no protection against racial discrimination and Parliament is capable of suspending existing statutory protection. The Constitution currently ignores the presence of indigenous peoples (Aboriginal and Torres Strait Islander

[1] See https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en#EndDec.

peoples) prior to European settlement, since when it was drafted they were excluded from the discussions on the creation of a new nation on their ancestral lands and waters.[2]

17. Protection against racism and racial discrimination is provided for in several federal laws and by-laws adopted by individual states and territories. The most important in this respect is the Racial Discrimination Act 1975, adopted pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination. All forms of racial discrimination at the federal level and in the various states and territories are prohibited in section 9: "It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life." The prohibition of racial discrimination covers various fields, including access to public places and transport, the provision of goods and services, the sale and occupation of land or the occupation of any residential or commercial plot or premises, membership of trade unions, employment and advertising. The law guarantees equality before the law. The Act was amended in 1995 through the entry into force of the Racial Hatred Act 1995, which incorporated new provisions for the prohibition of unlawful actions performed in public, comprising offensive, insulting, humiliating or intimidating behaviour based on race, colour or national or ethnic origin.

18. One of the specific characteristics of the Racial Discrimination Act 1975 is that it does not require proof of discriminatory intent or motive for an act to be characterized as unlawful, as is stated in section 18C of the Act, which was added in 1995 with the passage of the Racial Hatred Act:

> "(1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) The act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) The act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group."

It is stated in section 18D of the Act that section 18C does not render unlawful anything said or done reasonably and in good faith for academic, artistic or scientific purpose or any other genuine purpose in the public interest, or in reporting on any such conduct.

19. In addition to federal legislation, all states and territories have laws that make both direct and indirect racial discrimination unlawful. However, there is an important difference between the definition of direct discrimination found in the Racial Discrimination Act 1975 and that found in the laws of states and territories, which do not refer to preferences and distinctions based on race or to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination in relation to direct discrimination. Under such laws, direct discrimination occurs when a person is treated less favourably than another person of a different race.

20. In the Australian Capital Territory (Discrimination Act 1991) and in the Northern Territory (Anti-Discrimination Act 1992), racial discrimination is unlawful in the areas of education, employment, accommodation, clubs, goods and services and requests for information. The term "race" includes the colour, descent, ethnic or national origin, and nationality of a person. These Acts also make it unlawful to discriminate against a person on the ground that the person has a relative or associate who is of a particular race. Racial vilification is also unlawful in the Australian Capital Territory.

21. Similar legislation exists in New South Wales (Anti-Discrimination Act 1977), and in Victoria (Equal Opportunity Act 1995 and the Racial and Religious Tolerance Act 2001), which also prohibit racial vilification. Racial vilification under the New South Wales and Victoria Acts is any public act that is capable of inciting hatred towards, serious contempt

[2] Australian Human Rights Commission, "Constitutional reform: FAQs — why reform of the Constitution is needed". Available from www.humanrights.gov.au/publications/constitutional-reform-faqs-why-reform-constitution-needed.

for or severe ridicule of a person or a group of persons because of their race. In Victoria, the most serious forms of racial and religious vilification are considered criminal offences.

22. On 12 March 2013, the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 was passed unopposed by both houses of Parliament. That Act recognizes Aboriginal and Torres Strait Islander peoples as the first people of the land now known as Australia, their continuing relationship with land and waters, and their continuing cultures, languages and heritage.

23. The purpose of that Act was to build momentum for a referendum on constitutional recognition, and initially included a sunset clause of two years. On 20 March 2015, the Act was extended for a further three years until 28 March 2018. In the meantime, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples tabled its final report and recommendations. One of the recommendations (para. 2.40) was that a referendum on constitutional recognition should be held when it has the highest chance of success. So far, no model for such a referendum has been finalized, nor has a time frame been announced.[3]

IV. Institutional framework for combating racism and discrimination

24. The Special Rapporteur was pleased to note that there are credible and active institutions involved in the fight against racism and discrimination in Australia. In Sydney, he met with the President and Commissioners of the Australian Human Rights Commission — the national human rights institution — where he was able to confirm the exemplary work done by this institution, particularly with respect to racism and racial discrimination. The Commission is a statutory body funded by, but operating independently from, the Government. It has responsibility for investigating alleged infringements of federal anti-discrimination legislation (see paras. 17-19 above). It has jurisdiction to investigate and conciliate complaints of unlawful discrimination under the Age Discrimination Act 2004, the Disability Discrimination Act 1992, the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984, which include discrimination on the grounds of race or nationality, colour or ethnic origin, racial vilification, age, sex or gender, sexual harassment, marital or relationship status, sexual orientation, gender identity, intersex status, care status, actual or potential pregnancy, breastfeeding, trade union activity, criminal record, medical record, impairment or physical disability.[4] It also has jurisdiction to investigate alleged violations of human rights by the Commonwealth and complaints relating to equal opportunity in employment. The Australian Human Rights Commission Regulations 1989 define the grounds for "discrimination" for the purposes of complaints relating to equal opportunity in employment. That definition includes attributes that are not protected under federal anti-discrimination law, such as discrimination on the basis of criminal record. The Commission has consistently been granted "class A" status by the Global Alliance of National Human Rights Institutions in virtue of its full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The Commission issues an annual report.[5]

25. The Commission is not a judicial body or a tribunal and as such does not make judicial determinations and has no powers of adjudication. Its role is to investigate and conciliate complaints brought to its attention. It is a collegiate body made up of a President and seven Commissioners, among them the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Commissioners are also mandated to promote understanding and acceptance of their relevant laws. In 2015/16,

[3] Australian Human Rights Commission, "Factsheet: Aboriginal and Torres Strait Islander Peoples". Available from www.humanrights.gov.au/sites/default/files/5.%20Aboriginal%20and%20Torres%20Strait%20Islander%20peoples%20Final.pdf.

[4] Australian Human Rights Commission Regulations of 1989.

[5] See www.humanrights.gov.au/our-work/commission-general/publications/annual-reports-index.

the Commission received 77 complaints under section 18C of the Racial Discrimination Act 1975 and 52 per cent of those complaints were resolved after conciliation. If conciliation fails, a party can proceed to the Federal Court or Federal Circuit Court. This happens in a very small number of cases. The Special Rapporteur was informed that, in 2015/16, the Commission finalized 86 complaints about racial hatred. Only one complaint about racial hatred proceeded to court. In the event that the court finds a contravention of the Act, it may make orders for an apology or a correction, and/or award monetary damages.

26. The Race Discrimination Commissioner launched a number of initiatives as part of the federal National Anti-Racism Strategy, including the Workplace Cultural Diversity Tool, anti-racism materials for the national curriculum and an online social cohesion resource for local governments.[6] Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner is responsible for monitoring the human rights situation of indigenous Australians and producing an annual *Social Justice and Native Title Report*. The Commissioner has been active in the development of resources to help Aboriginal and Torres Strait Islander peoples understand the United Nations Declaration on the Rights of Indigenous Peoples, and the indigenous health campaign "Close the Gap", indigenous property rights, constitutional recognition of indigenous peoples, and the annual *Social Justice and Native Title Report*, the National Congress of Australia's First Peoples and the Northern Territory Emergency Response intervention.[7]

27. The Special Rapporteur was informed that, in recent years, the budget of the Australian Human Rights Commission has been severely reduced for a number of reasons, including but not limited to general budgetary cuts. The core funding of about $A 14 million for all the Commission's activities is allegedly inadequate to respond to the many enquiries and complaints, and a backlog of cases has piled up. The fact that the Commission handles more than 20,000 inquiries and 2,000 complaints each year, the vast majority of which are resolved to the satisfaction of all the parties involved, serves as proof of the smooth operation of this fundamental institution in Australia.

28. The different states and territories have all established their own human rights institutions under their respective legislation. During his visit, the Special Rapporteur interacted with representatives of the Australian Capital Territory Human Rights Commission, the Victorian Equal Opportunity and Human Rights Commission, the Anti-Discrimination Board of New South Wales and the Northern Territory Anti-Discrimination Commission.

29. The Special Rapporteur met the respective Chairs of the Australian Multicultural Council, the Prime Minister's Indigenous Advisory Council and ministerially appointed bodies that provide advice to the Government on multicultural and indigenous issues. The Australian Multicultural Council focuses on harnessing the economic and social benefits of the country's culturally diverse population, celebrating diversity, promoting social acceptance and fostering engagement with Australian values, identity and citizenship, addressing issues of racism and discrimination, and promoting greater intercultural and interfaith understanding and dialogue.[8] The Prime Minister's Indigenous Advisory Council, which provides advice to the Government on indigenous issues, is directly appointed by the Prime Minister. It comprises indigenous and non-indigenous Australians from a range of backgrounds and locations. It decided to focus on the following thematic areas of improvement for indigenous Australians: education, community safety and employment and economic development.[9]

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[6] Australian Human Rights Commission, *Annual Report 2014-2015* (Sydney, 2015), p. 17.

[7] See www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice.

[8] See www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia/australian-multicultural-council.

[9] See Australia, Department of the Prime Minister and Cabinet, "Meeting communique: Indigenous Advisory Council, February 2016". Available from www.dpmc.gov.au/news-centre/indigenous-affairs/meeting-communique-indigenous-advisory-council-february-2016.

30. The Special Rapporteur had the opportunity to meet with the President and Registrar of the National Native Title Tribunal, an independent institution established by the Native Title Act 1993. The Tribunal conducts inquiries, reviews and mediation; assists various parties with agreements to settle applications and to negotiate indigenous land use agreements; and supports representative Aboriginal and Torres Strait Islander bodies in matters related to land issues and titles.[10] The Tribunal is supported by its Registrar, who has a statutory responsibility: to maintain three distinct registers (the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements); to assess claimant applications for registration; to give notice of native title applications and indigenous land use agreements; and to formally register such agreements.

31. The Special Rapporteur also met with representatives of Indigenous Business Australia, a government agency established to ensure economic independence for Aboriginal and Torres Strait Islander peoples.[11] Through Indigenous Business Australia, the Government supports indigenous businesses and provides new and existing indigenous business owners with access to expert advice and business finance, with the aim of contributing to the economic independence of Aboriginal and Torres Strait Islander peoples. Indigenous Business Australia also assists indigenous Australians to buy their own homes, own their own businesses and invest in commercial ventures. The investment options developed by Indigenous Business Australia comply with international best practices in their respective areas.[12]

V. Public policies and initiatives to combat racism, racial discrimination, xenophobia and related intolerance

32. In 2011, the Government committed to develop and implement the National Anti-Racism Strategy, which was launched in 2012 and extended for a further three years in 2015. The aim of the Strategy is "to promote a clear understanding in the Australian community of what racism is, and how it can be prevented and reduced". The Strategy focuses on public awareness, education and youth engagement and is underpinned by research, consultation and evaluation. The Strategy established a National Anti-Racism Partnership, led by the Australian Human Rights Commission and comprising the representatives of the Attorney-General's Department, the Department of Social Services, the Department of Human Services, the Department of Immigration and Border Protection, the Australian Multicultural Council, the National Congress of Australia's First Peoples and the Federation of Ethnic Communities' Councils of Australia.

33. The National Anti-Racism Strategy is a two-tier strategy, which includes a nationwide public awareness campaign entitled "Racism. It Stops with Me", to raise awareness and coordinate the efforts of individuals or communities to promote anti-racism initiatives, and empower them to prevent and respond to racism. At the time of the visit, 364 organizations had joined the campaign; which comprised a series of six strategic projects to reinforce existing good practices, encompassing an online anti-racism platform for young people, a training tool on systemic racism against Aboriginal and Torres Strait Islander peoples, a Workplace Cultural Diversity Tool for employers, educational resources addressing racism, a national forum on diversity training for police forces, and a resource for local government on social cohesion.

34. The Special Rapporteur was pleased to note that non-governmental organizations, business groups, employers and sports federations had joined the campaign and had taken steps to combat racism, counter negative stereotypes and open up new opportunities, especially for groups that are traditionally discriminated against.

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[10] National Native Title Tribunal, "Overview of the Tribunal". Available from www.nntt.gov.au/aboutus/Pages/default.aspx.

[11] See www.iba.gov.au.

[12] Australia, "Closing the gap, Prime Minister's report 2015", p. 26. Available from www.dpmc.gov.au/sites/default/files/publications/Closing_the_Gap_2015_Report_0.pdf.

35. The Special Rapporteur was particularly impressed by the work undertaken by the Scanlon Foundation, a non-profit research organization established in 2001, which aims to make Australia a welcoming, prosperous and cohesive nation, particularly in relation to the integration of migrants into Australian society. The Foundation supports ongoing, long-term longitudinal research on indicators of social cohesion. Since 2007, it has published an annual national survey on mapping social cohesion, in conjunction with Andrew Markus of Monash University.

36. Those surveys rely on probability-based methods for surveying the population in order to understand the social impact of the country's increasingly diverse immigration programme, as Australia has been experiencing significant population growth in recent years. The most recent survey,[13] published in 2016, was conducted at a time when a number of political commentators pointed to a shift in public opinion and a revolt against political elites. However, in the 2016 survey, more evidence of stability and social cohesion than of deterioration was found.

37. For example, in the 2016 survey, there were continuing low levels of concern over issues of immigration; just 34 per cent of respondents — the lowest recorded in those surveys — considered that immigration intake was "too high". Similarly, respondents consistently report high levels of agreement with the proposition that "multiculturalism has been good for Australia" — more than 80 per cent in recent surveys. However, one area in which opinion has apparently shifted is in attitudes towards Muslims: it was reported in the 2016 survey that almost half the population would support a ban on Muslim immigration, which the Special Rapporteur found worrying.

38. The Special Rapporteur was thoroughly briefed on the Closing the Gap strategy, which aims to reduce disadvantages among Aboriginal and Torres Strait Islander peoples regarding life expectancy, child mortality, access to early childhood education, educational achievement and employment outcomes. It is a formal commitment made by all (federal, state and territory) governments to achieve equality for Aboriginal and Torres Strait Islander peoples within 25 years. This government strategy was developed in response to the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2005* and the Close the Gap campaign. Upon signature of the statement of intent at the Indigenous Health Equality Summit in March 2008, Aboriginal and Torres Strait Islander peoples and the Government of Australia agreed to work together to achieve equality in relation to health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-indigenous Australians by the year 2030.

39. The Council of Australian Governments has set measurable targets to monitor improvements in the health and well-being of the indigenous population. The targets are the following:

(a) Close the gap in life expectancy within a generation;

(b) Halve the gap in mortality rates for indigenous children under 5 within a decade;

(c) Ensure that all indigenous 4-year-olds in remote communities have access to early childhood education within five years;

(d) Halve the gap for indigenous students in reading, writing and numeracy within a decade;

(e) Halve the gap for indigenous students in year 12 attainment or equivalent attainment rates by 2020;

(f) Halve the gap in employment outcomes between indigenous and non-indigenous Australians within a decade.

40. Every year, the Prime Minister releases a Closing the Gap report to Parliament, which details the progress made in achieving those targets. A report is also released by the

[13] Available from http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf.

Close the Gap Campaign Steering Committee that details progress on the two health related targets and provides recommendations to the Government. The Special Rapporteur was informed of the latest report released in 2017,[14] which unfortunately reflects the fact that several targets are not on track for the year in question, in particular those relating to child mortality, life expectancy, employment and reading and numeracy levels. Achieving the objectives of the strategy will require additional efforts by all levels of government to reach the overall targets by their respective due dates.

41. In 2014, the Government of Australia introduced the Indigenous Advancement Strategy, which is now the way in which Government funds and delivers a range of programmes targeting Aboriginal and Torres Strait Islander peoples. The Indigenous Advancement Strategy replaced more than 150 individual programmes and activities with five flexible, broad-based programme streams: jobs, land and economy; children and schooling; safety and well-being; culture and capability; and remote Australia strategies. In the 2015/16 budget, the Government allocated $A 4.9 billion to the strategy over four years to cover the grant funding processes and administered procurement activities set up to achieve its objectives.[15]

42. In addition to the programmes and initiatives set up at the national level, which are designed by the Department of Social Services and implemented by the Department of Human Services, the Special Rapporteur was informed that the different states and territories have also initiated several projects on multiculturalism and advancing indigenous issues. In particular, he was made aware of a series of grants established by the Government of New South Wales for projects and events promoting cultural diversity; it also has a strategy for social housing aimed at accommodating indigenous people. Similarly, the Government of Victoria has launched a strategy aimed at celebrating diversity and promoting social cohesion, which includes a number of initiatives to counter racism and xenophobia and improve recruitment of persons from migrant and indigenous communities in the public sector. The Government of Victoria also has a series of programmes and grants for different community organizations grouped under three main areas: celebrating diversity; social cohesion and participation in public life; and accessible and responsible services. For indigenous persons living in Victoria, the state government has numerous programmes grouped around four main themes: maternal health and early childhood; education and training; health, housing and well-being; and safe families and communities and equitable justice.

VI. Challenges in the fight against racism, racial discrimination, xenophobia and related intolerance

A. Indigenous persons and the justice system

43. The Special Rapporteur was made aware of the challenges of continuing racial discrimination faced by indigenous persons as well as other minority groups. Indigenous persons (Aboriginal and Torres Strait Islander peoples) continue to be incarcerated at a disproportionate rate compared with non-indigenous Australians, a situation that had already been raised by his predecessor during his visit in 2001 (see E/CN.4/2002/24/Add.1, paras. 76-78). Indigenous Australians are not only more likely to be imprisoned than non-indigenous Australians, both adults and youth, but they are also more likely to be the victims of crime, including violent crime. For instance, indigenous Australians are hospitalized for assault at 17 times the rate of non-Indigenous Australians.[16] The Special

[14] Available from http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf.

[15] See www.dpmc.gov.au/indigenous-affairs/indigenous-advancement-strategy.

[16] National Indigenous Law and Justice Framework, 2009-2015, p. 6. Available from www.cabinet.qld.gov.au/documents/2009/sep/scag%20national%20indigenous%20law%20and%20justice%20framework/Attachments/NationalIndigenousLawandJusticeFramework.pdf.

Rapporteur was informed that while indigenous peoples comprise only 2.5 per cent of the country's population, they accounted for over a quarter of the prison population in 2012.[17]

44. More strikingly, indigenous young people were 25 times more likely in 2014 to be in detention than non-indigenous young people. About half (52 per cent) of young people in detention on an average night in June 2014 were indigenous.[18] In Western Australia, indigenous young people make up just 6 per cent of the 10 to 17-year-olds, but more than 75 per cent of those in detention, which means that in that state indigenous young people are 53 times more likely to be in detention.[19] From 2010 to 2014, the overrepresentation of indigenous young people in detention increased from 22 to 25 times the rate of non-indigenous young people, mainly due to a decrease in the rate of the latter in youth detention.[20]

45. Similarly, the incarceration rate of indigenous women is on the rise and they are the most overrepresented population in prison. In 2010, approximately 30 per cent of all incarcerated women in Australia were indigenous, while 24 per cent of all incarcerated men were indigenous. Based on that data, indigenous women are 16 times more likely to be incarcerated than non-indigenous women; likewise, indigenous men are 14 times more likely to be incarcerated than non-indigenous men.[21]

46. The Special Rapporteur notes that two Royal Commissions (one on the protection and detention of children in the Northern Territory and an inquiry by the Australian Law Reform Commission into the incarceration rate of Aboriginal and Torres Strait Islander peoples) have been investigating those issues. He is also aware that justice programmes designed and led by indigenous people that aim at offering alternatives to detention, where available, are important for early intervention, prevention, diversion and support services, but that many of these were struggling because of lack of government support and funding. The Special Rapporteur emphasizes the importance of including indigenous organizations in national strategies such as the National Crime Prevention Framework. The Closing the Gap strategy, which has now been under way for a number of years, sets targets for progress in, among others, indigenous health, employment, education and housing, but not in the criminal justice system. The Special Rapporteur believes that such targets could also be set up in the criminal justice system in order to reverse the inequalities.

47. The Special Rapporteur also notes that the current policing of indigenous communities is too punitive and needs to change urgently as its consequences can only lead to even further devastation for these communities. The techniques that Australia has pioneered in policing non-indigenous sections of the population would need to be harnessed to address the growing crisis of incarceration of indigenous persons.

B. Employment of indigenous persons

48. The Special Rapporteur is concerned about the disparity in employment rates between indigenous and non-indigenous Australians, and the fact that efforts to reduce this disparity have not met their target as mentioned in the latest annual Closing the Gap

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[17] Australia, Senate, Legal and Constitutional Affairs References Committee, "Value of a justice reinvestment approach to criminal justice in Australia" (2013), p. 31. Available from www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

[18] More recent data are not yet available. Australian Institute of Health and Welfare, "Youth detention population in Australia 2014" (Canberra, 2014), p. vii. Available from www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129549675.

[19] Amnesty International Australia, "There is always a brighter future: keeping indigenous kids in the community and out of detention in Western Australia" (Sydney, 2015), p. 2. Available from https://static.amnesty.org.au/wp-content/uploads/2016/09/CIE_WA_summary_lr.pdf?x85233.

[20] See Australian Institute of Health and Welfare, "Youth detention".

[21] Debbie Kilroy, Sisters Inside Inc., "The over-representation of Aboriginal and Torres Strait Islander women in prison". Available from www.sistersinside.com.au/media/Papers/The%20Stringer%20April%202013%20Over%20Representation%20of%20Aboriginal%20Women%20in%20Prison.pdf.

report.[32] Although there are a number of initiatives at all levels of government to increase employment among indigenous peoples, such as indigenous engagement networks, Indigenous Business Australia and indigenous procurement from government agencies, to name but a few, as well as blind recruitment undertaken in some departments and agencies, the fact remains that indigenous Australians are three times more likely to be unemployed than non-indigenous persons. In remote areas, employment is rare and indigenous communities remain peripheral to economic life and benefit little from economic progress and prosperity.

89. In 2012/13, the overall unemployment rate for Aboriginal and Torres Strait Islander peoples of working age was 21 per cent, significantly higher than the general unemployment rate, which was 5 per cent in July 2013.[33] Similarly, indigenous persons were disproportionately represented amongst those accessing income support and welfare payments. While indigenous Australians comprise approximately 2.5 per cent of the population in Australia, they represent 8.8 per cent of those currently receiving the Newstart Allowance, 12.5 per cent of those currently in receipt of the Parenting Payment (sole parent) and 15.9 per cent of those accessing Youth Allowance. All of those payments have been shown to fall below the poverty line.[34] That discrepancy also manifests itself when looking at the median weekly income per household (equalized gross weekly household income), which was $A 465 for indigenous Australians in 2011/12, compared with $A 869 for non-indigenous persons.[35]

C. Education of indigenous persons

90. The Special Rapporteur noted after his visit to a remote indigenous community that the teaching of indigenous subjects, particularly of languages and cultures, remains non-existent or very rare, even at the primary level. Although responsibility for educational curricula rests with the respective state/territory — and the situation can vary greatly from one state/territory to another — the competent authority in each instance should develop appropriate policies to cater to the needs of the indigenous communities they serve.

91. In 2013, it was reported that 74 per cent of indigenous children were enrolled at preschool and 70 per cent at school, compared with 91 per cent and 89 per cent, respectively, for non-indigenous children.[36] Similarly, in 2012/13, just under half (45.7 per cent) of indigenous Australians aged 20 or more had completed Year 12 or successfully completed Certificate III courses or above.[37] Based on age-standardized proportions, indigenous Australians aged 20 or more were around half as likely as non-indigenous persons to have completed Year 12 or successfully completed Certificate III courses or above.[38] Although there has been significant progress in the overall education of indigenous Australians since the 2008 baseline of the Closing the Gap strategy, the Special Rapporteur was informed that the annual target to reduce the disparity in reading, writing and numeracy for indigenous students had not been met in 2017.

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[32] Available from http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf.

[33] Australian labour market statistics and Australia, Steering Committee for the Review of Government Service Provision, "Overcoming indigenous disadvantage: key indicators 2014 — report" (2014). Available from www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014#thereport.

[34] Australia, Department of Social Services, "Annual report 2014-2015" (2015). Available from www.dss.gov.au/sites/default/files/documents/07_2016/dss_annual_report_print_version.pdf.

[35] "Overcoming indigenous disadvantage: key indicators 2014 — report" (see footnote 33 above), p. 23.

[36] Ibid., p. 18.

[37] Australian Bureau of Statistics, "Australian Aboriginal and Torres Strait Islander Health Survey: updated results, 2012-13", 6 June 2014. Available from www.abs.gov.au/ausstats/abs@.nsf/mf/4727.0.55.006.

[38] Ibid.

D. Other forms of discrimination

52. The Special Rapporteur was made aware of several incidents of police profiling of indigenous peoples and discrimination in the private sector, especially in the provision of and access to goods and services. He also noticed that, in general, there were very few indigenous police officers and that remote indigenous communities were patrolled by non-indigenous law enforcement officials, who were only integrated to a limited extent in the communities they were intended to serve.

53. The Special Rapporteur was informed that indigenous Australians face racism every day in their interactions with non-indigenous Australians. For instance, the laws concerning alcohol are often implemented in a manner that leaves indigenous people feeling humiliated for being singled out when shopping, or in accessing other services by private providers.

54. Similarly, during his meetings with civil society organizations, he was made aware of several incidents of profiling of members of sub-Saharan African and Arab communities by law enforcement agents. Several incidents have been reported involving young persons from these communities who had been subject to unjustified searches on their way to or from school. As in the case of indigenous communities, he was told that there were very few police officers from migrant communities, although in Victoria, there were efforts to recruit members of these communities as law enforcement officials.

55. Finally, the Special Rapporteur was informed that Australians had differing experiences of discrimination, as it varied considerably by ethnicity: for instance, there is a 60 per cent likelihood of indigenous Australians experiencing discrimination; for persons of African descent, the percentage is higher, at 75 per cent; and in the case of Asians and Muslims, the figure is 30 per cent.[39]

E. Racist hate speech

56. The Special Rapporteur was informed about remarks made by elected politicians concerning newly arrived migrants and, in particular, those against Muslims, which were of particular concern in a country that valued immigration and multiculturalism. While the Prime Minister's recent unequivocal statement against racism — delivered on the anniversary of Australia becoming a party to the International Convention on the Elimination of All Forms of Racial Discrimination — is to be commended, the fact remains that some populist politicians, cheered on by sections of mainstream media, continue to stereotype and fan hostility against certain categories of migrants. In particular, some reports have pointed to an increase in xenophobic hate speech, leading to the creation of a negative perception of migrants, particularly Muslims and persons of African descent, which is most worrisome.

57. The Special Rapporteur emphasizes that the current policy of compulsory detention of asylum seekers arriving by boat at offshore processing centres[40] — combined with the Government's campaign entitled "No way: you will not make Australia home",[41] which included a series of strong messages to discourage persons from arriving by irregular means — also contribute to the negative perception of newly arrived migrants, refugees and asylum seekers and can only further exacerbate the unfortunate incidents described above.

58. The Special Rapporteur heard of the continuing fears, threats and incidents of anti-Semitism faced by members of the Jewish community. The Special Rapporteur believes that it is the responsibility of political leaders to denounce and counter this divisive and racist rhetoric, particularly when made by members of their own political parties. The

[39] Available from http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-web-covers.pdf.

[40] See the report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru (A/HRC/35/25/Add.3).

[41] See www.theguardian.com/world/2014/apr/11/angus-campbell-stars-in-videos-warning-asylum-seekers-not-to-travel-by-boat.

media has a professional, as well as a moral, duty not to descend into racist and xenophobic rhetoric, stereotyping and scapegoating.

59. The Special Rapporteur was also made aware of cyberracism on the Internet and social media platforms. In a study released in 2011, it was reported that around 20 per cent of respondents had experienced some form of racist hate speech, including verbal abuse, name-calling, racial slurs and offensive gestures.[77] In 2012/13, cyberracism represented 40 per cent of the complaints of racial hatred received by the Australian Human Rights Commission.[78] In particular, anti-Muslim hate speech has been on the increase in recent years, especially on social media platforms.[79]

F. Attacks against the Australian Human Rights Commission

60. The Special Rapporteur was informed about the attacks made by some politicians against the Australian Human Rights Commission and, in particular, its President, Gillian Triggs, which are particularly troubling given the prestige and respectability this Commission enjoys internationally. Following the Commission's inquiry into the harm caused by the detention of migrant children, its President has faced public intimidation, questioning her integrity, impartiality and judgment. On several occasions in the recent past, efforts to weaken the financial resources and capacity of the Commission have resulted in budget cuts, which have been amplified by the additional functions assigned to it.

61. For the Special Rapporteur, this situation is even more unacceptable given the fact that Australia sponsored Human Rights Council resolution 27/18 on national institutions for the promotion and protection of human rights, in which the Council states, in paragraph 9, that national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations in their countries.

62. The fact that the Commission handles more than 20,000 inquiries and 2,000 complaints each year, the vast majority of which are resolved to the satisfaction of all parties, confirms its exemplary work, particularly with respect to racism and racial discrimination. It should be held up by politicians, as well as journalists, as a good example of the functioning of democratic institutions in Australia.

G. The debate on section 18C of the Racial Discrimination Act 1975

63. During the visit, the debate on whether section 18C of the Racial Discrimination Act 1975 imposes unreasonable restrictions on freedom of expression and should therefore be amended was constantly raised in discussions with civil society organizations, the Australian Human Rights Commission and their state equivalents, and state governments. The Special Rapporteur also discussed the issue with the members of the Parliamentary Joint Committee on Human Rights in Canberra, which was at the time carrying out an inquiry on the issue.

64. The Special Rapporteur recalls that section 18C sets the tone for an open, inclusive and multicultural Australia, which respects and values the diversity of its peoples and

[77] Helen Szoke, Race Discrimination Commissioner, Australian Human Rights Commission, "Racism exists in Australia — are we doing enough to address it?", statement made on 16 February 2012. Available from www.humanrights.gov.au/news/speeches/racism-exists-australia-are-we-doing-enough-address-it.

[78] Australian Human Rights Commission, "Cyber racism", 1 January 201[illegible]. Available from www.humanrights.gov.au/our-work/race-discrimination/projects/cyberracism.

[79] Online Hate Prevention Institute, "Spotlight on anti-Muslim internet ha[illegible]: interim report" (2015). Available from www.ohpi.org.au/documents/2020/11/05/Anti-Muslim-Hate-Online-Interim-Report.

protects indigenous persons and migrants against bigots and extremists, who have become more vocal in the country and other parts of the world. As the Australian Human Rights Commission stated in its submission to the Joint Committee:[15]

> "Racial vilification can harm the freedom of those who are its targets. It can have a silencing effect and can harm the ability of its victims to exercise their freedom of speech, among other freedoms. Legislation that prohibits racial vilification ensures those who experience the harms of racial vilification have access to a legal remedy. Such legislation also sends a strong message about civility, respect and tolerance in a multicultural society. Under international human rights law, and under Australian law, neither freedom of expression nor freedom from racial vilification has been considered an absolute or unfettered right. Each of these freedoms has always been subject to limitations and restrictions. As a result, freedom of expression and freedom from racial vilification can and do co-exist. These two freedoms are also subject to further limitations and restrictions that accommodate other human rights and important interests."

65. The Special Rapporteur was pleased to hear that in its report released on 28 February 2017, the Joint Committee made no recommendations for changing sections 18C and 18D[16] and acknowledged that its members held differing views on how to balance appropriately the right to freedom of speech and the right to protection from serious forms of racially discriminatory speech, and stressed the importance of the rule of law. The Special Rapporteur believes that removing this provision would undermine the efforts undertaken by the various levels of government for an inclusive Australia and may open the door to more racist and xenophobic hate speech, which, although on the increase as seen above, has been somewhat limited thanks to this provision. In his conversations with civil society, community and indigenous organizations and state governments, the Special Rapporteur found unambiguous support for this section of the Racial Discrimination Act 1975. He hopes that the Government will follow the recommendations of the Joint Committee.

VII. Conclusions and recommendations

66. **The Special Rapporteur thanks the Government of Australia and the different state and territorial entities for his successful visit. He noted the commitment of the Government to its policy on multiculturalism. Australia continues to receive a large number of migrants every year under the skilled labour scheme, in which the human rights of migrants need to be further protected. Australia offers resettlement to thousands of recognized refugees from war-torn countries and works with civil society organizations to offer a number of programmes at various levels for their integration. Australia should also work to create an environment of zero tolerance as regards discrimination in order to allow refugees to settle into their new communities as smoothly as possible.**

67. **The Special Rapporteur praises the vibrant civil society and numerous multicultural and ethnic organizations that help migrants and refugees settle in Australia and that provide a wide range of programmes and initiatives of their own.**

68. **The Special Rapporteur recognizes the ongoing discussion and consultations on the constitutional recognition of the place and rights of Aboriginal and Torres Strait Islander peoples. He welcomes the bipartisan commitment of the federal Government**

[15] Australian Human Rights Commission, "Inquiry into freedom of speech: Australian Human Rights Commission submission to the Parliamentary Joint Committee on Human Rights, 9 December 2016", pp. 5-6. Available from www.humanrights.gov.au/submissions/inquiry-freedom-speech.

[16] Australia, Parliamentary Joint Committee on Human Rights, "Inquiry report: freedom of speech in Australia" (Canberra, 2017), which reflects the situation as of February 2017. Available from www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_Inquiries/FreedomspeechAustralia/Report.

— and the state and territorial governments — to come to an agreement on such constitutional reform in the near future.

69. It is therefore important that the numerous efforts undertaken by all stakeholders, including the different levels of government entities, in combating racism, xenophobia and other forms of discrimination continue, especially during periods of uncertainty and the rise of populist movements and ideas in the global context.

70. In this connection and in a spirit of constructive dialogue, the Special Rapporteur wishes to make the following recommendations:

71. As regards the legal framework, the Special Rapporteur recommends that the Government:

(a) Expedite ratification of the United Nations treaties that are still not ratified; consider, in particular, becoming a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and ratify the ILO Conventions on the protection of migrant workers and on indigenous rights;

(b) Finalize a constitutional amendment in order to recognize the inherent rights and culture of the indigenous peoples of Australia (Aboriginal and Torres Strait Islander peoples) and set up constitutionally protected institutions to protect their ancestral rights and promote their culture and identity;

(c) Seize the opportunity when amending the Constitution to adopt a fundamental bill of rights, with a clause therein to establish its precedence over all other legislation. Such a bill of rights could be invoked by anyone whose rights seem threatened by the decision of any authority, at any time, before any court of law or tribunal, thereby providing protection for all and preventing any form of discrimination.

72. As regards the institutional framework, the Special Rapporteur recommends that the Government:

(a) Provide adequate resources to the Australian Human Rights Commission and its state and territorial counterparts in order for these institutions to be able to continue to carry out their fundamental role in the protection and promotion of human rights; guarantee their independence; and seriously investigate and properly sanction any personal attacks against their officials;

(b) Develop their policies on refugees and asylum seekers in accordance with their human rights and humanitarian obligations;

(c) Continue its commitment to, and funding of, the Closing the Gap strategy so as to end discrimination against indigenous Australians in accordance with the targets set; include administration of justice in those targets, especially in the criminal justice system; and provide more disaggregated data on how the strategy has reduced the inequalities between indigenous Australians and the rest of the population;

(d) Extend the different justice programmes that are designed and led by indigenous persons, including those on restorative justice, by providing adequate support and funding — with the involvement of indigenous organizations — to end the overrepresentation of indigenous Australians in the criminal justice system and to offer alternatives to detention; in this regard, the outcomes of the two Royal Commissions will be important steps, which will require follow-up;

(e) Ensure that law enforcement agencies, in particular police forces, reflect the diversity of Australian society and the communities they serve and increase their intake of recruits from indigenous and minority communities;

(f) Improve the coordination of the numerous programmes and initiatives to combat racism and to support indigenous Australians undertaken at all levels of

government in order to avoid duplication and ensure effective delivery to their intended recipients;

(g) Ensure adequate and constant funding for the numerous community organizations that provide services to migrants, refugees and indigenous communities. Funding should not be linked to partisan politics or subject to removal if criticism is expressed by those organizations, which play a crucial role, notably in successful integration into Australian society.

73. **As regards hate speech, the Special Rapporteur recommends:**

(a) That the highest levels of government and the leadership of all political parties adopt clear, strong and unequivocal positions against racism and racial discrimination, in particular condemning any act or speech against indigenous Australians or persons of African descent, Islamophobia or anti-Semitism;

(b) Continue the different campaigns and initiatives to fight racism, racial discrimination and related intolerance at all levels, with an emphasis on the grass-roots level, in conjunction with the numerous civil society organizations already playing an active role and with proper resources; the successful campaigns on combating racism in sports could serve as examples of good practice in this respect;

(c) That the media refrain from xenophobic stereotyping, scapegoating and racist remarks. Those acts should be duly investigated and prosecuted and the media and journalists should adopt a code of good conduct containing provisions against racism and xenophobia. The Special Rapporteur recalls that the media has a fundamental role to play in the fight against racism, xenophobia and other forms of discrimination; in this regard, it should reflect the composition of Australian society and include more persons from indigenous and minority communities;

(d) That the different levels of government, together with civil society, Internet providers and social media platforms, establish a plan of action in order to combat online racism and hate speech. In that regard, positive initiatives underlined in his report of 2014 to the Human Rights Council (A/HRC/26/49), which balance the right to freedom of expression and the right to protection against racism and hate speech, could serve as examples;

(e) That the provision (section 18C) of the Racial Discrimination Act 1975 that provides protection against racist hate speech and racial vilification remains in force in order to continue to protect victims of racist hate speech in a multicultural Australia.

74. **The Special Rapporteur also recommends that:**

(a) Employers consider the possibility of resorting to blind recruitment in order to improve the employment rate for indigenous Australians and members of migrant communities, and to attract the most qualified persons for a specific post;

(b) Given that Australia has been a country of immigration for the last two hundred years, receiving waves of migrants from different parts of the world who have greatly contributed to the development of its society, all Australians should therefore recognize the unique opportunity provided by migration and celebrate the country's diversity and multiculturalism.